INDEX

	Pages
Designation of portions of record to be reproduced in the single appendix	1
Docket entries	4
Pleadings in the United States District Court:	
Indictment	7
Waiver of jury trial	10
Defendant's trial brief	11
Notice of appeal	17
Certificate of clerk to record on appeal	18
Points on appeal and designation of record (Rule 17(6))	20
Reporter's transcript of proceedings, page 31, line 6 through page 34	22
United States Court of Appeals for the Ninth Circuit:	
Opinion of three-judge panel, September 11, 1968	25
Order of the Court of Appeals, October 18, 1968	28
Order recalling mandate, October 23, 1968	29
Order of the Court of Appeals, October 23, 1968	30
Opinion of the Court of Appeals, en banc, February 2, 1970	31
Order of the Court of Appeals, en banc, February 2, 1970	48
Exhibit, pages from Petitioner's Selective Service File	49-62
Certificate of clerk of United States Court of Appeals, Ninth Circuit, under Rule 21, Revised Rules of the Supreme Court of the United States	63

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
503 Market Street,
San Francisco, California 94105,
Telephone: (415) 433-2750,
NEIL HORTON,
1330 Broadway,
Oakland, California 94612,
Telephone: (415) 452-2133,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
500 Sansome Street,
San Francisco, California 94111,
Telephone: (415) 434-0610,
Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

DESIGNATION OF PORTIONS OF RECORD TO BE REPRODUCED IN THE SINGLE APPENDIX

To Erwin N. Griswold, Solicitor General and Attorney for Respondent:

Please Take Notice that Petitioner designates the following portions of the record in the above-entitled case as the portion to be reproduced in the single appendix:

1) All docket entries.

2) All pleadings in the District Court and the Judgment of the District Court.

3) Page 31, beginning at line 6, through page 34 of the Reporter's Transcript of proceedings of March 29, 1967, in the District Court.

4) The opinion of the three-judge panel of the Court of Appeals rendered on September 11, 1968.

5) Order of Court of Appeals, dated October 18, 1968, reversing judgment of the District Court.

6) Order of Court of Appeals, dated October 23, 1968, recalling mandate.

7) Order of the Court of Appeals, dated October 23, 1968, requiring the case to be heard en banc.

8) Opinion of the Court of Appeals, en banc, rendered on February 2, 1970.

9) Order of the Court of Appeals, en banc, entered February 2, 1970, affirming the judgment of the District Court.

10) As an exhibit to be included in the Single Appendix, the following pages from Petitioner's Selective Service file, which was introduced into evidence in the District Court: 7, 17, 18, 22, 24, 25, 26, 27, 28, 35, 36, 37, 39, 63.

The issue petitioner intends to present for review is that set forth in the "Question Presented", page 2 of the Petition for Writ of Certiorari.

Dated, May 13, 1970.

PAUL N. HALVONIK,
CHARLES C. MARSON,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
By PAUL N. HALVONIK,
Attorneys for Petitioner.

CRIMINAL DOCKET 41137

THE UNITED STATES

vs.

WILLIAM WARD EHLERT

Arthur Wells, Jr., Ret'd., *Attorney for Defendant*

---

50 USC App. 462—Refused to Submit to Induction
1 Count

Cash Received:

6-5-67	**Appeal**	5.00

Cash Disbursed:

Jun 6 1967	**C.D 1-96**	5.00

May 31 1967

Proceedings

1966:

Dec. 14—

Ord. Indictment filed, issue summons ret. 1/11/67 (Sweigert)

1. Filed Indictment, issued summons.

1967:

Jan. 11—

Deft. Arr't., plead NOT GUILTY. Ord. case con to 2/10/67 to be set for Jury Trial. (Sweigert)

2. Filed Appearance as Atty, for deft.

Jan. 13—

3. Filed Elec Rec of Arr't. & Plea (Env. No. 767) by Rich.

4. Filed summons on ret. ex.,

Feb. 10—

Deft. waived trial by Jury in writing. Ord. case con to 3/29/67 for Court Trial. (Sweigert)

Feb. 13—

5. Filed Waiver of Jury Trial. (Sweigert)

Mar. 29—

Ord. case assigned to Judge Zirpoli for Trial. (Carter)

Mar. 29—

Ord. Court Trial Evid. intro. Deft. adjudged GUILTY as charged. Ref. to Prob. Off. Ord. case con to 4/24/67 for Judg't. Deft. to remain on O/R. (Zirpoli)

6. Filed Deft's. Trial Brief.

Apr. 24—

Ord. case con to 4/27/67 @ 9:45 a.m. for Judg't. (Zirpoli)

Apr. 27—

Ord. case con to 5/31/67 @ 9:45 A.M. for Judg't. (Zirpoli)

May 31—

Ord. Deft. sent. to 2 yrs. impr. (Zirpoli)

June 1—

7. Entered Judg't. and commitment (filed 5/31/67 (Zirpoli)

June 5—

8. Filed Notice of Appeal.

June 6—

Made and mailed Notice and Notice of Appeal to USA.

Made and mailed Statement of Docket Entries to CCA. and Copy of Notice of Appeal.

No. 41137

United States District Court
Northern District of California

The United States of America
vs.
William Ward Ehlert

INDICTMENT

VIOLATION: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

A true bill,
/s/ Plandus Wainwright
Foreman.

Filed December 14, 1966,
James P. Welsh, Clerk.
Presented in Open Court and Ordered

Summons 1/11/67
/s/ W. T. Sweigert

Cecil F. Poole
United States Attorney
Attorney for Plaintiff

In the United States District Court
for the Northern District of California

Criminal No. 41137

United States of America,
Plaintiff,

vs.

William Ward Ehlert,
Defendant.

VIOLATION: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

INDICTMENT

The Grand Jury charges: THAT

WILLIAM WARD EHLERT,

defendant herein, on or about February 9, 1966, in the City of Oakland, County of Alameda, State and Northern District of California, did willfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules, regulations, and direction duly made pursuant thereto, in that he, having reported for induc-

tion as ordered by his local board, did then and there refuse to submit to induction into the Armed Forces of the United States.

A True Bill.

/s/ Plandus Wainwright

/s/ Cecil F. Poole
Cecil F. Poole
United States Attorney

PGS:kt

Filed December 14, 1966,
James P. Welsh, Clerk.

District Court of the United States
Northern District of California

No. 41137

The United States of America
vs.
Wm. Ward Ehlert

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, February 10, 1967.

/s/ William Ward Ehlert
Defendant

/s/ Arthur Wells, Jr.
Attorney for Defendant

/s/ Paul Sloan
Assistant United States Attorney

Approved:
/s/ W. T. Sweigert
Judge, United States District Court,
Northern District of California

Filed February 13, 1967,
James P. Welsh, Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Defendant.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

Violation: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

DEFENDANT'S TRIAL BRIEF

Statement of the Case

The material facts appear in the Selective Service file. Defendant wishes to stress the following:

1. He was sent an Order to Report for Induction on June 16, 1965, which ordered him inducted on July 14, 1965. (No. 17)

2. On July 13, 1965, defendant sent to the local board a letter indicating that he could not accept

induction and requesting conscientious objector status. Most important is the third paragraph of the letter (No. 18):

> You may consider this an inappropriate time for such a request. Unfortunately, I have been unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time.

3. Defendant was given SS form 150. (No. 22) on July 14.

4. Defendant submitted his 150 on July 26, its due date (No. 25).

5. No actions appear to have been taken on the SS 150. The file was sent to the state director.

6. The U.S. Attorney declined prosecution. (No. 35)

7. The local board reconsidered defendant's classification sometime between January 7 and January 19, 1966 (Nos. 35, 36) and declined to reopen. The reason given was that the information submitted did not indicate "a change in . . . status beyond [defendant's] control".

8. Defendant was ordered to report under the original ORI. The new reporting date was sent to him three days after reopening was denied. (No. 38)

9. Defendant reported for but refused to be inducted. (No. 43)

Argument

I

There are numerous points which defendant wishes to raise which will not be briefed. The reason therefor is that these points have been previously adjudicated and rulings adverse to defendant now appear to be law, at least in this Circuit. Defendant will raise these points in order to preserve them on appeal, but understands that this court is bound by appellate decisions.

II

However, defendant asserts that grounds exist which compel this court to find defendant not guilty.

The local board's decision not to reopen was based solely on the ground that defendant's change in status to that of a conscientious objector was not beyond his control. On the record, this decision was erroneous.

If a change in status occurs due to a change in conscience after an Order to Report for Induction, refusal to reopen is error and appeal lies therefrom. *Keene v. U.S.*, 266 F.2d 378, 384 (1959).

The Second Circuit has recently recognized that conscientious objection may not mature until after receipt of an induction notice and may in fact be precipitated by receiving such notice. *U.S. v. Gearey*, 368 F.2d 144 (1966). As aptly put by that court:

> The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previ-

> ously matured. Section 6(j) does not set any time limit by which an applicant's conscientious objections must fully crystallize in his mind, . . . The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments.

The evidence here clearly discloses that the induction order itself triggered the crystalization of defendant's beliefs. Defendant stated (No. 18) that ". . . I have been unable to make a decision of such moment until faced with the absolute necessity to do so."

This court is well aware of the complex of factors which may make up conscentious objection. It is not a simple thing, such as a missing leg which gives a 4-F classification. Rather, a man's whole life is in review. The more sincere and honest one tries to be with oneself, the more difficult the decision becomes, for conscientious objection implies a total posture towards the world. One must strive for consistency of belief and action in situations where one is in a small minority and is met with inconsistency and questions of difficult balancing every day. It should be no surprise that some cannot make the decision until external events force the decision upon them.

Further, it is most probable that one cannot ever control whether he is or is not a conscientious objector, in the same way that one cannot control a belief in God.

This defendant should have a right to an appearance and appeal through the Selective Service Sys-

tem. The reasons therefore are clearly stated by the *Gearey* court:

> The obvious purpose of the statutory scheme which provides for intervention by the Justice Department into the Selective Service appeal procedure, is to furnish a fount of information concerning an appellant's conscientious objection claim to the Appeal Board, so that a careful and enlightened decision can be reached. The Department's recommendation is based not only on the hearing which it conducts, but also on the report it receives from the FBI concerning the accuracy and sincerity of the applicant's claim. The Justice Department's role in the appeal procedure serves another purpose. It introduces into the inquiry a government agency less intimately associated with the armed forces than the Selective Service System, and not as concerned with meeting fixed quota calls. As a result, a more objective and disinterested approach to granting exemptions can be expected.

Admittedly, defendant's SS Form 150 is not a work of art. However, it does show that the defendant may have been confused about the legal meaning of "religious" as that term is understood since the *Seeger* decision. Defendant's answer to question #6 on his SS Form 150 (No. 26) indicates he believed "religious" meant a connection with orthodox religion. Perhaps defendant qualifies as a "Seeger C.O." The best way to find out is through the Selective Service System.

To sum up: no evidence whatsoever appears from which the board could conclude that defendant's

change in status to that of a conscientious objector was within his control. In fact, the evidence is all to the contrary. His change in status having been beyond his control, he is entitled to a reopening and a reconsideration with a right of appeal therefrom.

Wells & Chesney,
Attorneys for Defendant.
By Arthur Wells, Jr.

Filed March 29, 1967,
James P. Welsh, Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Defendant.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

NOTICE OF APPEAL

Notice is hereby given that William Ward Ehlert, defendant herein, appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this proceeding on May 31, 1967.

Dated: June 2, 1967.

Wells & Chesney,
By Arthur Wells, Jr.

Filed June 5, 1967,
James P. Welsh, Clerk.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, do hereby [sic] that the foregoing and accompanying documents listed below, are the originals (with the exception of the Indictment and Judgment and Commitment, which are certified copies) on file in the above entitled case and constitutes the record on appeal herein.

1. Indictment
2. Waiver of Jury Trial
3. Defendant's Trial Brief
4. Judgment and Commitment
5. Notice of Appeal
6. Statement of Docket Entries

7. Plaintiff's Exhibit No. 1

8. .....Volumes of Reporter's Transcript.

In Witness Whereof, I have hereunto affixed my hand and the seal of the above entitled Court this 7th. day of June, 1967.

James P. Welsh, Clerk,
By: Ramon E. Xavier, Deputy Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Appellant.

United States Court of Appeals
For the Ninth Circuit

No. 21,930

United States of America,
Plaintiff and Respondent,
vs.
William Ward Ehlert,
Defendant and Appellant.

POINTS ON APPEAL AND DESIGNATION OF RECORD (RULE 17(6))

To the Clerk of the above-entitled Court:

1. A concise statement of the point on which Appellant intends to rely is as follows:

Appellant stands convicted of failing to submit to induction in violation of 50 U.S.C. Appendix §462. Appellant claimed a change in status to that of conscientious objector after receiving his notice of induction. The lower court found that defendant-appellant factually had a change of status which was

beyond his control. However, that court ruled that, as a matter of law, a factual change in status to that of conscientious objector was not legally a change beyond one's control and therefore appellant was not denied due process by failure of the draft board to reopen and reconsider his claim and to afford him a right of appeal.

The lower court erred in holding, as a matter of law, that a change in status to that of conscientious objector cannot be beyond the control of the registrant.

2. Appellant designates the following as the record which is material to the consideration of the appeal:

1) All oral proceedings in this action, including all oral testimony, and all comment and argument of counsel and court;

2) All original papers transmitted by the District Court Clerk to this Court;

3) Government Exhibit No. 1, which is a certified copy of Appellant's Selective Service file.

Dated: 26 June 1967.

Wells & Chesney,
By Arthur Wells, Jr.,
Attorney for Defendant
and Appellant.

Filed June 26, 1967,
James P. Welsh, Clerk.

Reporter's Transcript of Proceedings, page 31, line 6 through page 34:

[R.T. 31] The Court: Well, are you gentlemen ready to submit it?

Mr. Wells: Yes.

Mr. Sloan: I think there is a very practical consideration in all cases as to what decision the Board makes on these last minute submissions of a claim of conscientious objection. The Court in Boyd concluded that there must be some end to the time when registrants can raise the claim of conscientious objection rather than raise and re-raise the right to review. That would result in chaos. I think this is the very purpose of the regulation.

The Court: Of course, Judge Kaufman has a different interpretation. Well, I would say this, that if this were a case in Judge Kaufman's circuit I would feel, based on the record before me, I would have to, I would have to acquit the accused. But being primarily subject to the interpretation of the Ninth Circuit, I feel that based on the Boyd case and the Parrott case, that the evidence of course is clear that **[R.T. 32]** the accused did not report into the service.

The only other action relates to the action of the Board and interpreting the action of the Board and the propriety of the action and the basis of the action, I should be guided by Ninth Circuit cases, and guided by those cases and by the record, I feel there is a basis for the action of the Board and therefore I have to find the defendant guilty.

I do so recognizing that the legal basis for the ultimate finding as relates to the action of the Board, in

view of the reasoning in the Geary case, leaves us with a question of some merit.

Now, I don't know whether there will be an appeal taken or not, or even that this is a case that ought to be appealed. You might get a more definitive statement from the Court of Appeals as to just how far they intend the Boyd case to apply.

Now, having found the defendant guilty, and instructing the Clerk to record him guilty, what do you have in mind in relation to judgment?

Mr. Wells: I would ask the matter be submitted to the probation department.

The Court: I will submit it to the probation department. How much time do you want, or do you think we should have?

[R.T. 33] Mr. Wells: They usually take three weeks.

Mr. Sloan: That would be ample, I am sure. We would have no objection to his remaining on his own recognizance.

The Court: He may continue on his own recognizance. Do you know whether the defendant intends to take an appeal?

Mr. Wells: He does intend to take an appeal. As far as that goes, I might point out that part of that question is the question of an appeal bond so that he might remain out.

The Court: Oh, I don't think we are going to have any problem on that because, very frankly, I think there is reasonable merit to this case. On that question, I don't know how the Government feels about it.

Mr. Sloan: No, I don't think we will raise any problem.

The Court: I have enough question in my own wisdom to know that this is a good case for appeal and that I could be reversed.

Mr. Wells: Yes. No, I just meant as far as him staying out pending the appeal.

The Court: That's what I say. Having all those facts in mind, I don't think you are going to have any [R.T. 34] problem on that score. At the present time he is out on his own recognizance pending the report of the probation officer. After I receive that report of the probation officer I will pronounce judgment and sentence. I am not indicating by anything I say what my attitude may be with relation to the judgment itself.

The Clerk: Let's make it April 24th, Your Honor, at 9:45 a.m.

The Court: Very well.

Kenneth J. Peck,
Official Reporter.

United States Court of Appeals
For the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

[September 11, 1968]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and BROWNING, Circuit Judges, and KILKENNY, District Judge

MERRILL, Circuit Judge:

Appellant has been convicted of a violation of 50 U.S.C.App. §462, in refusing to submit to induction into the armed forces. He was, on June 14, 1964, ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector.

In this respect Selective Service Regulations, 32 C.F.R. §1625.2, provide in part:

"The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds that

> there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The local board refused to reopen, advising appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystalization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side are *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side is *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967), and *United States v. Al Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). On the other hand in *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), we recently held that the registrant was entitled to the opportunity to file

a conscientious objection form for which application was made after notice of induction had been mailed. We expressly rejected the contention that denial of such right was harmless and nonprejudicial. In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* ..... F.2d ..... (9th Cir. 1968), followed the same course.

We here hold that the dictates of a registrant's conscience can constitute a circumstance beyond his control. Conscientious objection itself would seem to be a contradiction of control. It is difficult to see how one could in his thinking depart at will from a conviction which honestly is dictated by conscience. Conversely, a belief conveniently subject to the control of the holder would hardly seem to be conscientiously entertained. Accordingly, crystalization of a conscientious objection occurring after notice of induction can constitute a change over which the registrant had no control, justifying reopening of classification under §1625.2.

Reversed and remanded for further proceedings in the light of this opinion.

KILKENNY, Dissenting.

Impressed, as I am, with the logic of *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), and this Court's approval of *Schoebel* in *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959) and *Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966), I would affirm.

United States Court of Appeals
for the Ninth Circuit
No. 21930
DC # 41137

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

APPEAL from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

A True Copy:
Attest: October 15, 1968
Wm. B. Luck, Clerk
By /s/ William E. Wilson
William E. Wilson, Chief Deputy

Filed and entered September 11, 1968

Filed October 18, 1968,
James P. Welsh, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

ORDER RECALLING MANDATE

Before: MERRILL and BROWNING,
Circuit Judges

The certified copy of the judgment issued on September 11, 1968, is recalled.

Charles M. Merrill
James R. Browning
Circuit Judges

Filed October 23, 1968,
Wm. B. Luck, Clerk,

United States Court of Appeals
for the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,

vs.

United States of America,
Appellee.

ORDER

It is ordered that, upon the vote of a majority of the active judges of the court, the assignment of the above entitled cause, heretofore made to Circuit Judges Merrill and Browning and District Judge Kilkenny, be withdrawn and that the appeal be heard en banc on a day to be fixed.

The question with which the panel will be particularly concerned is whether the crystalization of a draft registrant's conscientious objection, arrived at only after notice to report for induction, can constitute a change of status over which the registrant has no control, so as to require a reopening of his classification under section 1625.2 of the Selective Service Regulations.

Filed October 23, 1968,
Wm. B. Luck, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 21,930 In Banc

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

[February 2, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BARNES, HAMLEY, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, CARTER, HUFSTEDLER, WRIGHT, KILKENNY and TRASK, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, on June 14, 1964, was ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector. Subsequently, he was convicted of failing to submit to induction into the Armed Forces in violation of 50 U.S.C.App. § 462.

Selective Service Regulations, 32 C.F.R. § 1625.2, in pertinent part, provide:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In refusing to reopen his classification, the local board advised appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as a matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side, among others, are *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967);

United States v. Jennison, 402 F.2d 51 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1969); *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967), *cert. denied* 390 U.S. 958 (1968), and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* 397 F.2d 370 (9th Cir. 1968) and *Oshatz v. United States,* 404 F.2d 9 (9th Cir. 1968) also distinguish *Gearey.* At first glance, *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), would seem to support appellant's views. While some of the language there employed points in that direction, a close analysis reveals that the precise point here presented was not there in issue. To the extent, if any, that *Boswell* may be in conflict with our views herein expressed, it is overruled.

The statutory authorization for C.F.R. § 1625.2 is found in 50 U.S.C.App. § 460, which provides, among other things, that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title." All of the authorities agree that the regulation is within the perimeter of the grant of power. Moreover, it is conceded that registrants, eligi-

ble for the draft, should not be permitted, without limitation, to challenge their status. Without such a regulation, the manpower quotas of Selective Service could not be met with any degree of certainty. An orderly administration of the Selective Service System requires such a regulation. Appellant does not really challenge the reasonableness of the regulation, nor its application to one whose conscientious objection matures prior to the notice to report. He urges that his views on the subject "crystallized" after he received the notice, and that we should follow the lead of *Sandbank, Gearey, Keene* and other similar cases.

Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking. Section 1625.2, with one exception, was enacted for the specific purpose of putting to an end the function of the Selective Service System once a registrant had received his notice to report. The mentioned exception being those cases where the registrant is in a position to furnish the Board with objective evidence entitling him, *prima facie,* to a change of status by reason of circumstances beyond his control. True enough, the regulation does create a brief period during which a registrant is not eligible to present a claim of conscientious objection. This result, in our opinion, does not invalidate the regulation. The logic behind requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable. A Board can readily ascertain the validity of an "ex-

treme hardship",[1] "sole surviving son",[2] and other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.

We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. § 1625.2. The judgment of the lower court is AFFIRMED.

CHAMBERS, CHIEF JUDGE, BARNES, CARTER, WRIGHT and TRASK, CIRCUIT JUDGES, CONCURRING.

DUNIWAY, Circuit Judge:

I concur. I do not think that the claimed "crystalization" of conscientious objection can be said to be "a change in . . . status *resulting from circumstances*

[1] 32 C.F.R. § 1622.30 (b).
[2] 32 C.F.R. § 1622.40 (a) (10).

over which the registrant has no control." (Emphasis added.) The word "circumstances" indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual processes of the registrant himself. Whether those processes are beyond the registrant's control I leave to the philosophers among us. I think that, whatever the answer to that question may be, they are not *circumstances* beyond his control.

Dictionary definitions tend to confirm this view. *Funk & Wagnall's New Standard Dictionary* defines "circumstances" as "1. Something existing or occurring incidental to *some other act or event;* a *related or concomitant act or thing.*" (Emphasis added.) *Webster's New International Dictionary,* 2d ed., defines the word as "1. One of the *conditions under which an act or event takes place* or with respect to which a fact is determined; a *condition, fact or event accompanying, or determining* the occurrence of *another fact or event.*" (Emphasis added.)

The practical considerations mentioned by my brother Kilkenny strongly reenforce these views. The regulation should be construed in a manner consistent with those considerations.

Judge Barnes, Ely and Carter concur in the foregoing concurring opinion.

ELY, Circuit Judge (Concurring):

I concur in the majority opinion, and I also endorse the logical analysis expressed by my Brother Duni-

way. At the same time, I believe that additional factors should be recorded.

We took this case *en banc* for the purpose of considering and resolving the one important problem which the principal opinion attacks, and I am glad that our court has now supplied desired guidance on that issue. My examination of the record convinces me, however, that insofar as this particular appeal is concerned, we may have indulged ourselves in a great deal of unnecessary intellectual exercise. The contents of Ehlert's Selective Service file lead me to believe that there was no alternative to the affirmance of Ehlert's conviction even had the majority adopted the position taken by my Brother Merrill.

The sole question before the District Court was whether Ehlert's local board erred in refusing to reopen Ehlert's classification. Under the applicable Regulation (32 C.F.R. §1625.2), all recognize that the board was disempowered to reopen the classification without expressly finding that there was a change in Ehlert's status resulting from circumstances over which he had no control. In determining whether or not it could make that finding, the board could, of course, look only to that which Ehlert himself submitted in support of his belated claim for conscientious objector status.[1] Even in cases not involving an alleged change in status after receipt of the induction

[1]This was conceded in the District Court. The trial judge recognized that there was no triable issue of fact and that his scope of review was confined to the determination of whether the contents of Ehler's Selective Service file disclosed the absence of any basis in fact for the board's refusal to reopen the classification. In this connection, Judge Zirpoli commented that "the very maximum you can go by is whatever was before the Board."

notice, the registrant must "clearly establish" his right to an exemption or deferred status. *Petrie v. United States,* 407 F.2d 269 (9th Cir. 1969); *Badger v. United States,* 322 F.2d 902, 906 (9th Cir. 1963).

Ehlert set forth his representations, after he received his notice to report for induction, in the standard Selective Service Form SSS 150. As I interpret those representations, none of them supplied the barest basis, even vestigial, upon which the local board could have supported a finding either that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystalized after his receipt of his notice to report for induction. The board would be required to make the determination whether Ehlert's representations would support the required finding, and we must presume the regularity of the board's proceedings. *Oestereich v. Selective Service Local Bd. No. 11,* 393 U.S. 233, 241, 21 L. Ed. 2d 402, 89 Sup. Ct. 414 (1968) (Harlan, J., concurring); *Bishop v. United States,* 412 F.2d 1064, 1067 (9th Cir. 1969).

The threshold question of whether Ehlert claimed to be opposed conscientiously to war in any form focuses our attention on his statements that "I believe that service in the armed forces of *this country at this time* is work toward the end of the destruction of the human race," and "the sole purpose of military service in *this country today* is preparation for a nuclear orgasm which would be totally destructive of human life and values." (Emphasis supplied.) He also stated that he did not believe in a Supreme Being, and that

he had no "religious" convictions. Furthermore, he did not claim to be driven by any moral or philosophical code that could be equated with "religion" within the meaning of *United States v. Seeger*, 380 U.S. 163, 13 L. Ed. 2d 833, 85 Sup. Ct. 850 (1965).

In addition to his failure to state a prima facie claim of conscientious objection, Ehlert also failed to present any facts that would have justified a finding that he had undergone a "change in status," i.e., he did not present a claim that his beliefs had crystalized after receipt of his induction notice. In answer to the inquiry as to "when . . . you received the training and acquired the belief which is the basis of your claim . . . ," Ehlert replied, "The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surrounding and the natural workings of an eager-to-know and questioning mind." In a letter to his local board Ehlert stated that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." This latter statement constitutes the only semblance of a claim that a new belief was reached after the induction notice, and it formed the basis for the argument at trial. District Judge Zirpoli expressed, as one of his then thoughts, the opinion that this language should be interpreted to mean that Ehlert had long been aware of his beliefs but had simply been unable to decide whether to

claim the status to which he felt entitled. At least, the board was warranted in interpreting the letter in this fashion and there was abundant basis in fact to support that interpretation. Judge Zirpoli observed that a basis in fact for this interpretation existed by reason of the long period of the development of Ehlert's attitude coupled with the late filing of the claim. Surely, too, the board was entitled to infer that Ehlert himself believed that he had undergone no change in status. When Ehlert presented his new claim, he wrote, "I realize that I no longer have the legal right to apply for the status of conscientious objector . . . ."

In his footnote 1, my Brother Merrill remarks, "The points raised in Judge Ely's concurring opinion were not reached by the District Court. . . . Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position." I cannot accept this conclusion. The judgment of conviction itself does not, of course, contain specific reasoning or include any explanation by the District Court for the ultimate determination of guilt. During the oral argument of counsel, there were numerous Socratic exchanges in which the learned trial judge clearly indicated his consideration of separate legal approaches. It is true that in the final exchange, the court made a comment which supports a portion of the minority's footnote 1. During the argument, however, the Gov-

ernment's attorney strenuously contended, and I believe correctly, that there was no factual basis upon which the board could have found a change in status. On this, in the extended colloquy, the District Judge commented, "They [the board] were not obligated to reopen." In think it is obvious, therefore, that the District Court did in fact consider, as it was obligated to consider, the problem to which my comments are directed. It is not unusual for a court, during an analytical exchange, to express thoughts that it may not, in the end, retain; consequently, I believe that we should not cull a judge's off-hand oral comments from the record and employ only some of them in order to conclude definitively that the trial court's ultimate conclusion was based solely upon only a portion of his comments.

The minority also, in its footnote 1, notes "From the record it would appear doubtful that they [the points I discuss] were reached even by the local board." This conclusion flies in the face of the presumption of regularity noted earlier, since the board would be required to make these determinations before it could inform the registrant that it would not reopen or, most certainly, before it could make the required finding that there had been presented a prima facie claim of a change of status resulting from circumstances beyond the registrant's control. Here, the only significant notation made by the board and appearing in the Selective Service file is "Reviewed and not reopened." From this, I cannot agree that there is any doubt whatsoever that the board, per-

forming its duty with regularity, could have blinded itself to the recorded facts which I have specified.

All the above notwithstanding, it seems clear to me that even if we construe the District Court's statements at the conclusion of the argument as a ruling that as a matter of law there could be no change to conscientious objector status after receipt of the induction notice, still we should hold that the District Court was not in a position to reach this question since Ehlert presented no factual basis upon which his board could have justifiably based a finding that he had presented a prima facie claim for a change of status resulting from circumstances beyond his control.[2] From Ehlert's own revelations, the board was thoroughly justified in concluding that his representations as to his beliefs, even if true, would not legally entitle him to conscientious objector status and that such beliefs were not first reached after the notice to report for induction was sent and received. Even, therefore, if we assume, arguendo, that the opposing views[3] of the dissenters are correct, I submit that we

---

[2]The *Gearey* court itself recognized that late filing could be a factor in determining the sincerity of the claim or the time of crystalization. *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966).

[3]The dissenters see a "hiatus" created by the fact that a literal construction of Department of Defense Directive No. 1300.6 could support the conclusion that the military will not consider claims arising before actual induction. I believe that the supposed "hiatus" is more fancied than real. I do not read the directive in this way, since the thrust of the directive is toward claims arising before the induction notice. Moreover, I am confident that military authorities would recognize a probable constitutional obligation to consider the genuineness of an inductee's claim that conscientious objector beliefs had become fixed within the brief period between the time of the notice to report for induction and his actual induction into the armed forces.

would neverthless be compelled to affirm the judgment of conviction.

CHAMBERS, Circuit Judge, concurring:

In my view, the case should be disposed of as Judge Ely would. However, a clear majority of the judges, including the dissenters, thinks the case should be resolved "on the Road to Damascus." On that road, I agree with Judge Kilkenny. Therefore, I concur in Judge Kilkenny's opinion.

MERRILL, Circuit Judge, with whom Circuit Judges HAMLEY, KOELSCH, BROWNING and HUFSTEDLER join, Dissenting:

The majority opinion, affirming the District Court, holds as matter of law that crystallization of a registrant's conscientious objection to war is not, under 32 C.F.R. § 1625.2, "a change in [his] status resulting from circumstances over which [he] had no control."[1] In this posture of the case we must assume that appellant in fact enjoys the status of a conscientious objector but is precluded from recognition of that status by virtue of the provisions of the regulation. Two distinct contentions were advanced by appellee in support of the District Court. The majority opinion appears to rely on both.

[1]The points raised in Judge Ely's concurring opinion were not reached by the District Court. From the record it would appear doubtful that they were reached even by the local board. Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position.

1. First it was contended that crystallization of conscientious objection is not a "circumstance" under the regulation; that by "circumstances" the regulation was intended to include only such objectively ascertainable conditions as a change in dependency status or physical condition; that it was not meant to include such intangible considerations as state of mind. For two reasons I find this contention unacceptable: (a) I do not believe the regulation is rationally subject to such a construction; (b) so construed, I would hold the regulation to be contrary to statute and invalid.

(a) A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings. I cannot attribute to the regulation such a discriminatory result.

Further this construction would seem to create an anomalous situation noted in *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966); *cert. denied*, 389 U.S. 959 (1967).[2]

---

[2]Footnote 11, 368 F.2d at page 150, states:

"Any other conclusion would result in the anomalous situation that individuals whose claim of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for defer-

The Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *See Seeger v. United States,* 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty. The armed forces quite appropriately focus their attention on conscientious objection crystallizing after induction, leaving cases of earlier crystallization to the jurisdiction of the Selective Service System.

The majority's construction thus creates a hiatus: Those who become conscientious objectors after notice of induction but before actually being inducted would appear to be excluded from application of the Congressional policy. Application of the policy is made to depend not on one's true status but on when one acquired it.

(b) Legislation creating this exemption from military service, 50 U.S.C.App. §456(j) provides for no such limitation. The enforcement of orderly pro-

---

ment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

cedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service.

2. It was next contended that this "circumstance" (crystallization of conscientious belief), accepting it as such, cannot be said to be one over which the registrant has no control. In other words, assuming appellant to be a true conscientious objector, it was within his control not to become one.

This strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.

Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.

The issue for the board after notice of induction, is, then, no different from that presented by an earlier claim: Is the avowed belief conscientiously entertained?[3] Only the procedure of its resolution differs. But this factual issue should be faced and not be disposed of as a matter of law on such an assumption as is here advanced.

I would reverse.

---

[3]The further issue is presented: Did the belief in fact crystallize after receiving notice of induction and thus constitute a *change* in status? *Dugdale v. United States*, 389 F.2d 482 (9th Cir. 1968).

United States Court of Appeals
for the Ninth Circuit

No. 21930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

APPEAL from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 2, 1970

[Selective Service File, p. 87]

61

January 28, 1966

William Ward Ehlert
2717-A Hillegass Avenue
Berkeley, California

Dear Sir:

On March 3, 1964, you were classified I-A by this local board. SSS Form 110 (Notice of Classification) was mailed to you on March 4, 1964. You had 10 days after the mailing of this notice to file a written request for a personal appearance before this local board. You failed to do this, therefore you waived your rights of personal appearance after said classification. You also failed to appeal this classification.

Under date of June 16, 1965, you were mailed an Order to Report for Induction scheduled for July 14, 1965. You failed to comply with this order and requested an SSS Form No. 150 (Special Form for Conscientious Objectors) which was furnished.

Be informed that the local board reconsidered your classification after the filing of SSS 150 under the provisions of Part 1625 of the Selective Service Regulations and determined that the information submitted on SSS Form 150 was not a change in your status which was beyond your control. For this reason the local board declined to reopen your classification.

A personal appearance is a procedural right under the regulations only when a change in classification is made by the local board and a timely request is made by the registrant within 10 days after the classification card is mailed.

BY DIRECTION OF THE LOCAL BOARD

(Mrs.) Norma M. Niclass, Clerk

SELECTIVE SERVICE SYSTEM

BOARD NO. 18
Santa Rosa, Calif. 95404

March 2, 1966

7-3

Mr. William W. Ehlert
2901 Telegraph Avenue
Berkeley, California 94705

Subject: EHLERT, William Ward
SS No. 4 18 43 548

Dear Sir:

Following receipt of your letter your selective service file was requested for purposes of review.

We note that at the time the classification questionnaire was completed no entry was made regarding a claim of conscientious objection but that on the day you were ordered to report for induction you requested the conscientious objector form. The special form for conscientious objectors was completed and returned by you on July 26, 1965. At its meeting the local board reviewed the claim of conscientious objection and it was it's decision that the file not be reopened.

It is noted that you had requested a personal appearance which was denied by the local board. The reason for this denial was set forth in a letter to you dated January 28, 1966. It is noted that the classification of Class I-A given you on March 4, 1964 was not appealed and the first indication of your claim of conscientious objection was submitted on the day when you were to have reported for induction. The local board reviewed the matter and informed you by letter of it's decision.

On the basis of the foregoing, it appears that your procedural rights have been observed in all respects, and this headquarters contemplates no intervention.

FOR THE STATE DIRECTOR

HENRY A. CARLSON
Major, USAF
Manpower Officer

cc: LB No. 18

63

United States Court of Appeals
for the Ninth Circuit

No. 21930

William Ward Ehlert,
Appellant,

vs.

United States of America,
Appellee.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, William B. Luck, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in three volumes to be a full, true and correct copy of the entire record, excluding original exhibits, of the above entitled cause in the said Court of Appeals, made pursuant to the request of counsel for the appellant and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

Attest my hand and seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, 1970.

William B. Luck, Clerk

Supreme Court of the United States

No. 1383 --- , *October Term, 19* 69

William Ward Ehlert,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 4 ---------- , 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- . Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED

APR 9 1969

CLERK, SUPREME COURT

In the Supreme Court
of the
United States

October Term, 1968

No. 1-5103 /20

WILLIAM WARD EUDLEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

PAUL N. HALVONIK,
CHARLES C. MARSON,
of the Union Civil Liberties Union
of Northern California,
[illegible] Market Street,
San Francisco, California 94105,

NEIL HORTON,
[illegible] Street,
Oakland, California [illegible],

STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN
& LUPPERT,
[illegible] Sansome Street,
San Francisco, California 94111,
Attorneys for Petitioner.

Subject Index

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Constitutional, statutory and regulatory provisions involved	2
Statement of the case	4
Reasons for granting the writ	5
A. The courts of appeals are in conflict	7
B. The Gearey rule is the sounder rule	8
Conclusion	13

Table of Authorities Cited

Cases	Pages
Bolling v. Sharpe, 374 U.S. 497 (1954)	12
Davis v. United States, 374 F.2d 1 (5th Cir. 1967)	7
Keene v. United States, 266 F.2d 378 (10th Cir. 1959)	7
Martinez v. United States, 384 F.2d 50 (10th Cir. 1967) cert. den. 390 U.S. 1016 (1968)	7
Mulloy v. United States, October Term, 1969, No. 655	9
Porter v. United States, 334 F.2d 792 (7th Cir. 1964)	7
Shapiro v. Thompson, 394 U.S. 618 (1969)	12
Sherbert v. Verner, 374 U.S. 398 (1963)	12
Skinner v. Oklahoma, 316 U.S. 535 (1942)	12
Speiser v. Randall, 357 U.S. 513 (1958)	12
United States v. Al-Majieh Muhammed, 364 F.2d 223 (4th Cir. 1966)	7
United States v. Blaisdell, 294 F.Supp. 1303 (D.Me. 1968)	8
United States v. Brown, 129 F.Supp. 237 (D.N.J. 1955)	8
United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), cert. denied 389 U.S. 959 (1957)	7, 8, 10
United States v. Helm, 386 F.2d 434 (4th Cir. 1967), cert. denied 390 U.S. 958 (1968)	7
United States v. Hinch, 292 F.Supp, 696 (W.D.Mo. 1968)	8

Pages

United States v. Jennison, 402 F.2d 51 (6th Cir. 1968), cert. den. 394 U.S. 912 (1969) 7
United States v. Maine, 417 F.2d 951 (10th Cir. 1969) 7
United States v. Mulloy, 412 F.2d 421 (6th Cir. 1969) 7
United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), cert. den. 394 U.S. 961 (1969) 7
United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953) 7
United States v. Seeger, 326 F.2d 846 (1964) 12
United States v. Seeger, 380 U.S. 163, (1965) 9
United States v. Skinner, Cr. 6862, 1 Sel.Serv.L.R. 3042 (D.N.H. 1968) 8
United States v. Stafford, 389 F.2d 215 (2d Cir. 1968) 7
United States v. Taylor, 351 F.2d 228 (6th Cir. 1965) 7
United States v. Underwood, 151 F.Supp., 874 (E.D.Pa. 1955) 8

Statutes

Military Selective Service Act of 1967:
Section 6(j) 3,11
28 U.S.C., Section 1254(1) 2
50 U.S.C.App., Section 456(j) 3,11
50 U.S.C.App., Section 462 2,4

Constitutions

United States Constitution:
First Amendment 11
Fifth Amendment 2

Regulations

Selective Service Regulation, 32 C.F.R., Section 1625.2 ..... 2, 3, 4, 6, 7, 8, 9, 10, 11, 12

Rules

Rule of Court:
Rule 19.1(b) 8

Other Authorities

Department of Defense Directive No. 1300.6 3,10

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No.

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner William Ward Ehlert prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 2, 1970.

OPINION BELOW

The opinion of the Court below in banc is not yet reported. It is reproduced as Appendix A herein.

An earlier and contrary panel opinion, also unreported, is reproduced as Appendix B herein.

JURISDICTION

The opinion and judgment of the Court below were entered on February 2, 1970, affirming petitioner's conviction in the United States District Court for the Northern District of California for violating 50 U.S.C.App., Section 462. By order entered on March 16, 1970, Mr. Justice Douglas extended petitioner's time in which to file a petition for writ of certiorari to and including April 3, 1970. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Does Selective Service Regulation, 32 C.F.R. Section 1625.2, preclude a local board from considering a registrant's claim of conscientious objection because it crystallized after the board ordered the registrant to report for induction?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

50 U.S.C.App., Section 456(j):

"(j) Conscientious Objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Selective Service Regulations, 32 C.F.R. Section 1625.2:

"The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Department of Defense Directive No. 1300.6:

"Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

STATEMENT OF THE CASE

Petitioner, a Selective Service registrant, was classified I-A by his local board on March 3, 1964. On June 16, 1964, he was ordered to report for induction. Before his induction date he wrote to his local board requesting conscientious objector status, stating that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so." On January 19, 1966, the local board declined to reopen petitioner's classification. In response to petitioner's inquiry the board advised him by letter that it had declined to reopen his classification because his claim to conscientious objection "was not a change in your status which was beyond your control." Petitioner's induction order was renewed, and he refused to submit to induction.

Petitioner was indicted in the District Court for the Northern District of California for violating 50 U.S.C.App., Section 462. He was tried by the court, found guilty, and sentenced to two years imprisonment. The central issue at petitioner's trial was whether the crystallization of his claim to conscientious objection after an induction order as "a change in the registrant's status resulting from circumstances over which the registrant had no control," within the meaning of 32 C.F.R. Section 1625.2. The District Court held that it was not, although the Court stated that if it had been sitting in the Second Circuit where the opposite rule prevails, it would have been bound to acquit petitioner.

The majority of the panel of the Court of Appeals for the Ninth Circuit which heard petitioner's appeal

took the view that the crystallization of petitioner's claim *was* such a change in status, and accordingly entered an order and opinion reversing his conviction on September 11, 1968 (see Appendix B). On October 23, 1968, the judgment was recalled and the appeal set to be heard in banc. On February 2, 1970, the entire Court entered a judgment and opinion affirming petitioner's conviction (see Appendix A) by a vote of eight to five, the majority holding that the District Court had correctly applied Section 1625.2.

REASONS FOR GRANTING THE WRIT

The issue raised by this case is simple and straightforward: Whether a claim of conscientious objection, which has matured after a local board has ordered the registrant to report for induction, can be considered by the board. It is a recurring question that has been passed upon, with conflicting results, by various Courts of Appeals. It is a question that will persist in arising for conscience, being what it is, will persist in asserting itself in some young men at that time between the receipt of an order to report for induction and induction into the Armed Forces.

This Court should resolve the conflict between the Courts of Appeals. Had petitioner been tried in New York he would, as the District Judge observed (T.R. p. 31, L. 20-23), have been acquitted. But he was tried in San Francisco and instead stands convicted. A verdict that is dictated by geography is manifestly an unfair verdict.

Moreover, the rule which obtains in the Second Circuit (under which petitioner would have been acquitted) is, we think, superior to the rule announced by the Ninth Circuit in affirming petitioner's conviction. The Ninth Circuit's interpretation of 32 C.F.R. § 1625.2 suffers from two infirmities:

1) It is predicated on the assumption that one may choose the time when his scruples against participation in war mature into a concrete conscientious objection against participation in war. Such a premise is at odds with the very notion of conscience. A conscience that makes known its presence only at propitious moments is hardly worthy of the name. Conscience simply cannot be cut to fit a temporal mold.

2) Under the Ninth Circuit rule a conscientious objection that matures before receipt of an order to report for induction is entitled to recognition and a conscientious objection that matures after submission to induction is entitled to recognition,[1] but claims like petitioner's will never receive consideration; they are both tardy and premature! This anomalous result is not required by 32 C.F.R. § 1625.2, goes against the grain of 50 U.S.C.App. § 456(j) and presents an invidious discrimination inconsistent with the due process clause of the Fifth Amendment.

[1]See Department of Defense Directive No. 1300.6.

A. THE COURTS OF APPEALS ARE IN CONFLICT

Whether 32 C.F.R. § 1625.2, as a matter of law, precludes a local board from considering the validity of a registrant's claim of conscientious objection which has matured after the board has ordered him to report for induction, is a question that has divided the circuits. The Second and Tenth Circuits hold that the regulation does not bar such a determination. *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1957); *United States v. Sandbank*, 403 F.2d 38 (2d Cir. 1968) (dictum), *cert. denied* 394 U.S. 961 (1969); *United States v. Stafford*, 389 F.2d 215 (2d Cir. 1968); *Keene v. United States*, 266 F.2d 378 (10th Cir. 1959); *Martinez v. United States*, 384 F.2d 50 (10th Cir. 1967) (dictum), *cert. denied* 390 U.S. 1016 (1968); *United States v. Maine*, 417 F.2d 951 (10th Cir. 1969) (dictum). The Fourth, Fifth, Sixth and Seventh Circuits hold to the contrary. *United States v. Al-Majeh Muhammed*, 364 F.2d 223 (4th Cir. 1966); *United States v. Helm*, 386 F.2d 434 (4th Cir. 1967), *cert. denied* 390 U.S. 958 (1968); *Davis v. United States*, 374 F.2d 1 (5th Cir. 1967); *United States v. Jennison*, 402 F.2d 51 (6th Cir. 1968) (dictum), *cert. denied* 394 U.S. 912 (1969); *United States v. Taylor*, 351 F.2d 228 (6th Cir. 1965); *United States v. Mulloy*, 412 F.2d 421 (6th Cir. 1969) (dictum); *United States v. Schoebel*, 201 F.2d 31 (7th Cir. 1953); *Porter v. United States*, 334 F.2d 792 (7th Cir. 1964).[2] By a vote of 8-5 the Ninth Circuit has, in this case, joined the latter circuits.

[2]The First, Third and Eighth Circuits of the Courts of Appeals have not passed on the question. Reported decisions of the District

The record in this case squarely presents the recurring and persistent issue that has produced such division among the circuits. At trial, the District Court Judge, after hearing argument addressed to the question presented in this petition, stated:

> ". . . if there were a case in Judge Kaufman's Circuit . . . [the 2d Circuit] . . . I would feel, based on the record before me, I would have to acquit the accused." (T.R. p. 31, lines 20-23.)[3]

Under this Court's Rule 19.1 (b) the instant case is one appropriate for review.

B. THE GEAREY RULE IS THE SOUNDER RULE

There are two extremely cogent reasons for preferring the rule announced in *United States v. Gearey, supra,* to the rule adopted by the Ninth Circuit majority in this case:

Courts in those Circuits adopt the *Gearey* rule. See, *United States v. Blaisdell,* 294 F.Supp. 1303 (D.Me. 1968); *United States v. Skinner,* Cr. No. 6862, 1 Sel.Serv.L.R. 3042 (D.N.H. 1968); *United States v. Brown,* 129 F.Supp. 237 (D.N.J. 1955); *United States v. Underwood,* 151 F.Supp. 874 (E.D.Pa. 1955); *United States v. Hinch,* 292 F.Supp. 696 (W.D.Mo. 1968).

[3]This statement puts to rest the doubt expressed in Judge Ely's concurring opinion that the District Court may not have decided the substantive issue here presented. Nor, it is submitted, is the concurring opinion correct in wondering whether the local board refused to reopen petitioner's classification because of its interpretation of the regulation or because of the possible view that petitioner had not made out a prima facie claim to conscientious objector status. This doubt disregards the fact that the local board, in a personal letter to petitioner, advised him that it had not reopened his classification because his claim to conscientious objector status "was not a change in your status which was beyond your control" (quoted by the majority opinion, Appendix A, p. ii). Thus eleven of the thirteen judges of the Court below correctly perceived that the case squarely presented the question of proper interpretation of Section 1625.2.

1) The Ninth Circuit rule, since it misapprehends the nature of conscience, engrafts an erroneous gloss on 32 C.F.R. § 1625.2. 1625.2 authorizes the local board to reopen a registrant's classification following the mailing of an induction order when the board finds "that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."[4]

The majority below held that the maturation of a conscientious objector claim after mailing of an order to report for induction is not a "circumstance" over which a registrant can exercise no control. "Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking." Appendix A, p. iv. This view, however, conflicts with the fundamental nature of a claim of conscience. A claim of conscience is not merely a political opinion or a personal moral code. A conscientious objection to participation in war is one "to which all else is subordinate or upon which all else is ultimately dependent." *United States v. Seeger,* 380 U.S. 163, 176 (1965). Such a belief by its very definition is one that is not entertained by convenience. On the contrary, a belief that can be altered at will is a belief falling without the ambit of the *Seeger* definition.

---

[4]This Court has granted certiorari in a related case, *Mulloy v. United States,* October Term, 1969, No. 655. *Mulloy* presents the issue (among others) whether a local board's refusal to reopen a registrant's classification after receipt of a conscientious objection claim was error when there was no outstanding induction order at the time of the claim.

Judge Merrill's dissenting opinion sharply exposes this critical fallacy in the majority's reasoning:

> "One simply cannot order his conscience be still or make himself believe what he does not believe. . . ."
>
> "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished by the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." (Appendix A, p. xvi).

"Conscience" and "control" are conceptually antagonistic. The majority in mistaking the nature of conscience misread § 1625.2.

2) The Ninth Circuit rule produces what the Second Circuit has aptly characterized as an "anomalous situation." *United States v. Gearey, supra,* 368 F.2d at 150, fn. 11. A claim of conscientious objection advanced prior to the mailing of an induction order may be considered by the local board and such claims advanced after induction, when they have matured after induction, may be considered by the military. Department of Defense Directive No. 1300.6. But the rule adopted by the Ninth Circuit in this case forecloses board review of claims of conscience maturing after the mailing of the induction order and Directive No. 1300.6, by its own terms, forecloses review of claims of conscience that have matured prior to induction. Directive 1300.6, in pertinent part, provides:

> ". . . request for discharge after entering military service, based solely on conscientious objection

which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

The creation of a "no man's land" for conscience which asserts itself after an induction order but before induction is not required by the language of § 1625.2. The unambiguous language of § 6(j) of the Military Selective Service Act of 1967, 50 U.S.C.App. § 456(j) does not permit a reading of § 1625.2 which creates a "no man's land" for claims of conscience which mature "unseasonably":

> *"Nothing* contained in this title *shall be construed to require any person* to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added.)
>
> 50 U.S.C.App. § 456(j).

Congress, clearly, did not intend to create a class of conscientious objectors who, because their conscience spoke unpropitiously, are excluded from § 6(j)'s exemption. Indeed any congressional enactment making such a distinction between claims of conscience would raise serious constitutional questions. Even assuming that exemption for conscientious objectors is a matter of legislative grace not compelled by the First Amendment's free exercise of religion guarantee, nevertheless, government may not arbi-

trarily and unreasonably grant the exemption privilege to some and deny it to others. *Sherbert v. Verner*, 374 U.S. 398 (1963). Thus the conscientious objector exemption granted by Congress is subject to the limits of the Constitution.[5]

A law affecting fundamental religious liberties cannot, in the absence of some compelling state interest, draw distinctions between religious beliefs. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner, supra*, 374 U.S. at 403 and 406. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Such distinctions, usually condemned as a violation of the guarantee of equal protection of the laws, also violate the guarantee of due process of law contained in the Fifth Amendment. *Bolling v. Sharpe*, 374 U.S. 497 (1954).

A governmental policy extending exemption to claims of conscience maturing prior to an induction order and after submission to induction but denying exemption to claims of conscience arising between those times would be an unjustifiable and invidious discrimination. The language of § 6(j), however, does not remotely suggest such a policy and 32 C.F.R. § 1625.2 should not be construed in a manner which produces such a questionable result.

---

[5] "We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress . . . For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See *Speiser v. Randall*, 357 U.S. 513 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination." *United States v. Seeger*, 326 F.2d 846, 851 (1964).

CONCLUSION

For the aforementioned reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Dated, March 27, 1970.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN,
& LIPPETT,
By PAUL N. HALVONIK,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

William Ward Ehlert, Appellant, vs. United States of America, Appellee.	No. 21,930 IN BANC

[February 2, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BARNES, HAMLEY, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, CARTER, HUFSTEDLER, WRIGHT, KILKENNY and TRASK, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, on June 14, 1964, was ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector. Subsequently, he was convicted of failing to submit to induction into the Armed Forces in violation of 50 U.S.C.App. § 462.

Selective Service Regulations, 32 C.F.R. § 1625.2, in pertinent part, provide:

"The classification of a registrant shall not be reopened after the local board has mailed to such

> registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In refusing to reopen his classification, the local board advised appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as a matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert denied* 394 U.S. 961 (1969); *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side, among others, are *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967); *United States v. Jennison,* 402 F.2d 51 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1969); *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967), *cert.*

denied 390 U.S. 958 (1968), and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* 397 F.2d 370 (9th Cir. 1968) and *Oshatz v. United States,* 404 F.2d 9 (9th Cir. 1968) also distinguish *Gearey.* At first glance, *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), would seem to support appellant's views. While some of the language there employed points in that direction, a close analysis reveals that the precise point here presented was not there in issue. To the extent, if any, that *Boswell* may be in conflict with our views herein expressed, it is overruled.

The statutory authorization for C.F.R. § 1625.2 is found in 50 U.S.C.App. § 460, which provides, among other things, that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title." All of the authorities agree that the regulation is within the perimeter of the grant of power. Moreover, it is conceded that registrants, eligible for the draft, should not be permitted, without limitation, to challenge their status. Without such a regulation, the manpower quotas of Selective Serv-

ice could not be met with any degree of certainty. An orderly administration of the Selective Service System requires such a regulation. Appellant does not really challenge the reasonableness of the regulation, nor its application to one whose conscientious objection matures prior to the notice to report. He urges that his views on the subject "crystallized" after he received the notice, and that we should follow the lead of *Sandbank, Gearey, Keene* and other similar cases.

Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking. Section 1625.2, with one exception, was enacted for the specific purpose of putting to an end the function of the Selective Service System once a registrant had received his notice to report. The mentioned exception being those cases where the registrant is in a position to furnish the Board with objective evidence entitling him, *prima facie,* to a change of status by reason of circumstances beyond his control. True enough, the regulation does create a brief period during which a registrant is not eligible to present a claim of conscientious objection. This result, in our opinion, does not invalidate the regulation. The logic behind requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable. A Board can readily ascertain the validity of an "extreme hardship",[1] "sole surviving son",[2] and

[1] 32 C.F.R. § 1622.30(b).
[2] 32 C.F.R. § 1622.40(a)(10).

other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.

We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. § 1625.2. The judgment of the lower court is AFFIRMED.

CHAMBERS, Chief Judge, BARNES, CARTER, WRIGHT and TRASK, Circuit Judges, Concurring.

DUNIWAY, Circuit Judge:

I concur. I do not think that the claimed "crystalization" of conscientious objection can be said to be "a change in . . . status *resulting from circumstances* over which the registrant has no control." (Emphasis added.) The word "circumstances" indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual

processes of the registrant himself. Whether those processes are beyond the registrant's control I leave to the philosophers among us. I think that, whatever the answer to that question may be, they are not *circumstances* beyond his control.

Dictionary definitions tend to confirm this view. *Funk & Wagnall's New Standard Dictionary* defines "circumstances" as "1. Something existing or occurring incidental to *some other act or event;* a *related or concomitant act or thing.*" (Emphasis added.) *Webster's New International Dictionary,* 2d ed., defines the word as "1. One of the *conditions under which an act or event takes place* or with respect to which a fact is determined; a *condition, fact or event accompanying, or determining* the occurrence of *another fact or event.*" (Emphasis added.)

The practical considerations mentioned by my brother Kilkenny strongly reenforce these views. The regulation should be construed in a manner consistent with those considerations.

Judges Barnes, Ely and Carter concur in the foregoing concurring opinion.

ELY, Circuit Judge (Concurring):

I concur in the majority opinion, and I also endorse the logical analysis expressed by my Brother Duniway. At the same time, I believe that additional factors should be recorded.

We took this case *en banc* for the purpose of considering and resolving the one important problem which the principal opinion attacks, and I am glad

that our court has now supplied desired guidance on that issue. My examination of the record convinces me, however, that insofar as this particular appeal is concerned, we may have indulged ourselves in a great deal of unnecessary intellectual exercise. The contents of Ehlert's Selective Service file lead me to believe that there was no alternative to the affirmance of Ehlert's conviction even had the majority adopted the position taken by my Brother Merrill.

The sole question before the District Court was whether Ehlert's local board erred in refusing to reopen Ehlert's classification. Under the applicable Regulation (32 C.F.R. § 1625.2), all recognize that the board was disempowered to reopen the classification without expressly finding that there was a change in Ehlert's status resulting from circumstances over which he had no control. In determining whether or not it could make that finding, the board could, of course, look only to that which Ehlert himself submitted in support of his belated claim for conscientious objector status.[1] Even in cases not involving an alleged change in status after receipt of the induction notice, the registrant must "clearly establish" his right to an exemption or deferred status. *Petrie v. United States*, 407 F.2d 269 (9th Cir. 1969); *Badger v. United States*, 322 F.2d 902, 906 (9th Cir. 1963).

---

[1]This was conceded in the District Court. The trial judge recognized that there was no triable issue of fact and that his scope of review was confined to the determination of whether the contents of Ehlert's Selective Service file disclosed the absence of any basis in fact for the board's refusal to reopen the classification. In this connection, Judge Zirpoli commented that "the very maximum you can go by is whatever was before the Board."

Ehlert set forth his representations, after he received his notice to report for induction, in the standard Selective Service Form SSS 150. As I interpret those representations, none of them supplied the barest basis, even vestigial, upon which the local board could have supported a finding either that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystalized after his receipt of his notice to report for induction. The board would be required to make the determination whether Ehlert's representations would support the required finding, and we must presume the regularity of the board's proceedings. *Oestereich v. Selective Service Local Bd. No. 11,* 393 U.S. 233, 241, 21 L. Ed. 2d 402, 89 Sup. Ct. 414 (1968) (Harlan, J., concurring); *Bishop v. United States,* 412 F.2d 1064, 1067 (9th Cir. 1969).

The threshold question of whether Ehlert claimed to be opposed conscientiously to war in any form focuses our attention on his statements that "I believe that service in the armed forces of *this country at this time* is work toward the end of the destruction of the human race," and "the sole purpose of military service in *this country today* is preparation for a nuclear orgasm which would be totally destructive of human life and values." (Emphasis supplied.) He also stated that he did not believe in a Supreme Being, and that he had no "religious" convictions. Furthermore, he did not claim to be driven by any moral or philosophical code that could be equated with "religion" within the meaning of *United States v.*

Seeger, 380 U.S. 163, 13 L. Ed. 2d 833, 85 Sup. Ct. 850 (1965).

In addition to his failure to state a prima facie claim of conscientious objection, Ehlert also failed to present any facts that would have justified a finding that he had undergone a "change in status," i.e., he did not present a claim that his beliefs had crystalized after receipt of his induction notice. In answer to the inquiry as to "when . . . you received the training and acquired the belief which is the basis of your claim . . .," Ehlert replied, "The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." In a letter to his local board Ehlert stated that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." This latter statement constitutes the only semblance of a claim that a new belief was reached after the induction notice, and it formed the basis for the argument at trial. District Judge Zirpoli expressed, as one of his then thoughts, the opinion that this language should be interpreted to mean that Ehlert had long been aware of his beliefs but had simply been unable to decide whether to claim the status to which he felt entitled. At least, the board was warranted in interpreting the letter in this fashion and there was abundant basis in fact to sup-

port that interpretation. Judge Zirpoli observed that a basis in fact for this interpretation existed by reason of the long period of the development of Ehlert's attitude coupled with the late filing of the claim. Surely, too, the board was entitled to infer that Elhert himself believed that he had undergone no change in status. When Elhert presented his new claim, he wrote, "I realize that I no longer have the legal right to apply for the status of conscientious objector . . . ."

In his footnote 1, my Brother Merrill remarks, "The points raised in Judge Ely's concurring opinion were not reached by the District Court. . . . Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position." I cannot accept this conclusion. The judgment of conviction itself does not, of course, contain specific reasoning or include any explanation by the District Court for the ultimate determination of guilt. During the oral argument of counsel, there were numerous Socratic exchanges in which the learned trial judge clearly indicated his consideration of separate legal approaches. It is true that in the final exchange, the court made a comment which supports a portion of the minority's footnote 1. During the argument, however, the Government's attorney strenuously contended, and I believe correctly, that there was no factual basis upon which the board could have found a change in status. On this, in the extended colloquy,

the District Judge commented, "They [the board] were not obligated to reopen." I think it is obvious, therefore, that the District Court did in fact consider, as it was obligated to consider, the problem to which my comments are directed. It is not unusual for a court, during an analytical exchange, to express thoughts that it may not, in the end, retain; consequently, I believe that we should not cull a judge's off-hand oral comments from the record and employ only some of them in order to conclude definitively that the trial court's ultimate conclusion was based solely upon only a portion of his comments.

The minority also, in its footnote 1, notes "From the record it would appear doubtful that they [the points I discuss] were reached even by the local board." This conclusion flies in the face of the presumption of regularity noted earlier, since the board would be required to make these determinations before it could inform the registrant that it would not reopen or, most certainly, before it could make the required finding that there had been presented a prima facie claim of a change of status resulting from circumstances beyond the registrant's control. Here, the only significant notation made by the board and appearing in the Selective Service file is "Reviewed and not reopened." From this, I cannot agree that there is any doubt whatsoever that the board, performing its duty with regularity, could have blinded itself to the recorded facts which I have specified.

All the above notwithstanding, it seems clear to me that even if we construe the District Court's state-

ments at the conclusion of the argument as a ruling that as a matter of law there could be no change to conscientious objector status after receipt of the induction notice, still we should hold that the District Court was not in a position to reach this question since Ehlert presented no factual basis upon which his board could have justifiably based a finding that he had presented a prima facie claim for a change of status resulting from circumstances beyond his control.[2] From Ehlert's own revelations, the board was thoroughly justified in concluding that his representations as to his beliefs, even if true, would not legally entitle him to conscientious objector status and that such beliefs were not first reached after the notice to report for induction was sent and received. Even, therefore, if we assume, arguendo, that the opposing views[3] of the dissenters are correct, I submit that we would nevertheless be compelled to affirm the judgment of conviction.

---

[2]The *Gearey* court itself recognized that late filing could be a factor in determining the sincerity of the claim or the time of crystalization. *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966).

[3]The dissenters see a "hiatus" created by the fact that a literal construction of Department of Defense Directive No. 1300.6 could support the conclusion that the military will not consider claims arising before actual induction. I believe that the supposed "hiatus" is more fancied than real. I do not read the directive in this way, since the thrust of the directive is toward claims arising before the induction notice. Moreover, I am confident that military authorities would recognize a probable constitutional obligation to consider the genuineness of an inductee's claim that conscientious objector beliefs had become fixed within the brief period between the time of the notice to report for induction and his actual induction into the armed forces.

CHAMBERS, Circuit Judge, concurring:

In my view, the case should be disposed of as Judge Ely would. However, a clear majority of the judges, including the dissenters, thinks the case should be resolved "on the Road to Damascus." On that road, I agree with Judge Kilkenny. Therefore, I concur in Judge Kilkenny's opinion.

MERRILL, Circuit Judge, with whom Circuit Judges HAMLEY, KOELSCH, BROWNING and HUFSTEDLER join, Dissenting:

The majority opinion, affirming the District Court, holds as matter of law that crystallization of a registrant's conscientious objection to war is not, under 32 C.F.R. § 1625.2, "a change in [his] status resulting from circumstances over which [he] had no control."[1] In this posture of the case we must assume that appellant in fact enjoys the status of a conscientious objector but is precluded from recognition of that status by virtue of the provisions of the regulation. Two distinct contentions were advanced by appellee in support of the District Court. The majority opinion appears to rely on both.

1. First it was contended that crystallization of conscientious objection is not a "circumstance" under the regulation; that by "circumstances" the regulation

[1]The points raised in Judge Ely's concurring opinion were not reached by the District Court. From the record it would appear doubtful that they were reached even by the local board. Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position.

was intended to include only such objectively ascertainable conditions as a change in dependency status or physical condition; that it was not meant to include such intangible considerations as state of mind. For two reasons I find this contention unacceptable: (a) I do not believe the regulation is rationally subject to such a construction; (b) so construed, I would hold the regulation to be contrary to statute and invalid.

(a) A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings. I cannot attribute to the regulation such a discriminatory result.

Further this construction would seem to create an anomalous situation noted in *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966); *cert. denied*, 389 U.S. 959 (1967).[2]

---

[2]Footnote 11, 368 F.2d at page 150, states:

"Any other conclusion would result in the anomalous situation that individuals whose claim of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed

The Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. See *Seeger v. United States,* 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty. The armed forces quite appropriately focus their attention on conscientious objection crystallizing after induction, leaving cases of earlier crystallization to the jurisdiction of the Selective Service System.

The majority's construction thus creates a hiatus: Those who become conscientious objectors after notice of induction but before actually being inducted would appear to be excluded from application of the Congressional policy. Application of the policy is made to depend not on one's true status but on when one acquired it.

(b) Legislation creating this exemption from military service, 50 U.S.C.App. § 456(j) provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself,

---

prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service.

2. It was next contended that this "circumstance" (crystallization of conscientious belief), accepting it as such, cannot be said to be one over which the registrant has no control. In other words, assuming appellant to be a true conscientious objector, it was within his control not to become one.

This strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.

Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.

The issue for the board after notice of induction is, then, no different from that presented by an earlier claim: Is the avowed belief conscientiously

entertained?[3] Only the procedure of its resolution differs. But this factual issue should be faced and not be disposed of as a matter of law on such an assumption as is here advanced.

I would reverse.

[3]The further issue is presented: Did the belief in fact crystallize after receiving notice of induction and thus constitute a *change* in status? *Dugdale v. United States*, 389 F.2d 482 (9th Cir. 1968).

Appendix B

United States Court of Appeals
for the Ninth Circuit

William Ward Ehlert, Appellant, vs. United States of America, Appellee.	No. 21,930

[September 11, 1968]

On Appeal from the United States District Court
for the Northern District of California

Before: MERRILL and BROWNING, Circuit Judges, and KILKENNY, District Judge

MERRILL, Circuit Judge:

Appellant has been convicted of a violation of 50 U.S.C.App. §462, in refusing to submit to induction into the armed forces. He was, on June 14, 1964, ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector.

In this respect Selective Service Regulations, 32 C.F.R. §1625.2, provide in part:

> "The classiffication of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds that

there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The local board refused to reopen, advising appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystalization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side are *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side is *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967), and *United States v. Al Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). On the other hand in *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), we recently held that the registrant was entitled to the opportunity to file a

conscientious objection form for which application was made after notice of induction had been mailed. We expressly rejected the contention that denial of such right was harmless and nonprejudicial. In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* ___ F.2d ..... (9th Cir. 1968), followed the same course.

We here hold that the dictates of a registrant's conscience can constitute a circumstance beyond his control. Conscientious objection itself would seem to be a contradiction of control. It is difficult to see how one could in his thinking depart at will from a conviction which honestly is dictated by conscience. Conversely, a belief conveniently subject to the control of the holder would hardly seem to be conscientiously entertained. Accordingly, crystalization of a conscientious objection occurring after notice of induction can constitute a change over which the registrant had no control, justifying reopening of classification under § 1625.2.

Reversed and remanded for further proceedings in the light of this opinion.

KILKENNY, Dissenting.

Impressed, as I am, with the logic of *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), and this Court's approval of *Schoebel* in *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959) and *Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966), I would affirm.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1383

WILLIAM WARD EHLERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of California, petitioner was convicted of having wilfully disobeyed the order of his local Selective Service board to submit to induction, in violation of 50 U.S.C. App. 462. He was sentenced to two years' imprisonment. The court of appeals reversed, one judge dissenting (Pet. App. xviii–xx). Rehearing *en banc* was thereafter ordered, however, and the court of appeals affirmed the conviction by an eight-to-five vote (Pet. App. i–xvii).

The issue which prompted the court of appeals to grant rehearing *en banc* and on which petitioner seeks review is whether the alleged maturation of con-

382-691—70

scientious objector beliefs is, within the language of 32 C.F.R. 1625.2, a circumstance "over which the registrant had no control," so that the local board is required to reopen a registrant's classification when, it is asserted, such beliefs crystallized and a C.O. claim is made for the first time *after* a notice to report for induction has been mailed. As petitioner points out (Pet. 7), the courts of appeals are, and have been for some time, sharply divided on this question, with the Ninth Circuit in the instant case aligning itself with the majority of circuits, which have held that such claims fall outside the scope of the regulation (see Pet. App. ii–iii).[1]

While we agree with petitioner that the issue is a recurring one and that the evenhanded administration of the Selective Service laws justifies its resolution by this Court, we entertain doubts as to whether this case is the proper vehicle for resolution of the issue. As Judge Ely pointed out in his concurring opinion (Pet. App. ix–xii), it is extremely doubtful that petitioner's representations to the local board were sufficient to establish that his beliefs had in fact crystallized *after* receipt of the induction notice. We note, moreover, that the identical issue raised by the petition here is included, as one of the questions presented, in the government's pending petition for certiorari in *United States* v. *Holmes*, No. 1311, this Term. *Holmes* involves a ruling of the Second Circuit that a conscientious objector

[1] Despite the conflict in the circuits, this Court has on a number of occasions declined the opportunity to resolve it. See *Hoapili* v. *United States*, 395 F. 2d 656 (C.A. 9), certiorari denied, 395 U.S. 930, and the cases cited at Pet. 7 and Pet. App. ii–iii, in which cases presenting this issue review was denied by this Court.

claim, raised for the first time orally and at the induction station itself, must nonetheless, under the pertinent regulation (32 C.F.R. 1625.2), be considered by the local board.[2]

If our petition in *Holmes* is granted, the Court's decision on the merits is likely to cast light upon or settle the question which is sought to be presented by petitioner and which was reached and resolved by most of the judges below in this case. Accordingly, the Court may (notwithstanding our position that the issue is not appropriately posed in this case) wish to defer disposition of the instant petition until it acts in the *Holmes* case. Should the Court deny our petition in *Holmes*, however, it is our view that, for the reasons stated above, certiorari should be denied in this case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1970.

[2] *Holmes* thus involves additional questions as to whether, even if the maturation of conscientious objector beliefs after the mailing of the notice of induction is within 32 C.F.R. 1625.2, such a claim must be considered when presented orally (rather than in written form, as the regulations prescribe), and when made to personnel at the induction station instead of to the appropriate local board.

U.S. GOVERNMENT PRINTING OFFICE: 1970

Subject Index

Page

Summary of argument 4

Argument 5

I. Selective Service Regulation 1625.2 does not preclude a consideration of a claim for conscientious objector status merely because the claim is filed after the mailing of an order to report 5

II. Section 6(j) does not impose any limitation upon the time when a conscientious objector claim must mature or must be asserted 13

III. If Section 6(j) permits the imposition of a time limitation upon the maturation of a sincere conscientious objector claim, then it is unconstitutional as violative of the Fifth and First Amendments 17

Conclusion 19

Table of Authorities Cited

Cases Pages

Bolling v. Sharpe, 374 U.S. 497 (1954) 17

Ehlert v. United States, 422 F. 2d 332 (9 Cir. 1970) 2, 5, 6, 8, 9

Keene v. United States, 266 F. 2d 378 (10 Cir. 1959) 14, 15

Martinez v. United States, 384 F. 2d 50 (10 Cir. 1967) 14, 15

Mulloy v. United States, ... U.S. ....., 90 S. Ct. 1766, 38 U.S.L.Wk. 4509 (1970) 4, 9, 10, 11, 17

Paszel v. Laird, ... F. 2d ..... (2 Cir. No. 34052, April 8, 1970), 2 S.S.L.R. 3591 ..... 6, 13

Shapiro v. Thompson, 394 U.S. 618 (1969) 17

Sherbert v. Verner, 374 U.S. 398 (1963) 18

Skinner v. Oklahoma, 316 U.S. 535 (1942) 18

Speiser v. Randle, 357 U.S. 513 (1948) 18

United States v. Clark, 105 F. Supp. 613 (W.D. Pa. 1952) 14

United States v. Crawford, 119 F. Supp. 729 (N.D. Calif. 1954) 6, 14, 16

Pages

United States v. Delfin, 419 F. 2d 226 (2 Cir. 1969)..... 12
United States v. Gearey, 368 F. 2d 144 (2 Cir. 1966).... 14
United States v. Hinch, 292 F. Supp. 696 (E.D. Mo. 1968) 14
United States v. Maine, 417 F. 2d 951 (10 Cir. 1969) 12, 14, 15, 16
United States v. Sandbank, 403 F. 2d 38 (2 Cir. 1968)...14, 15
United States v. Seeger, 326 Fed. 2d 846 (2 Cir. 1964), affirmed, 380 U.S. 163 (1965)..... 18
United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1955) 14
Welsh v. United States, ... U.S. ....., 90 S. Ct. 1792, 38 U.S.L.Wk. 4486 (1970) 4, 7, 18

Constitutions

United States Constitution:
First and Fifth Amendments 3, 5

Statutes

18 U.S.C. 3006A 1
50 U.S.C. App. 450(j) 4
50 U.S.C. App. 456(j) 3, 4, 7, 13, 17
50 U.S.C. App. 460(b)(1) 16

Regulations

Selective Service Regulation 1625.2 (32 C.F.R. 1625.2)....passim
Section 1625.4 .....10, 11

Texts

Stern and Gressman, Supreme Court Practice, 4th ed., 1969, p. 320, n. 85 1
Webster's New Twentieth Century Dictionary, Unabridged 2d ed., New York, 1965 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAWYERS' SELECTIVE SERVICE PANEL OF SAN FRANCISCO AS AMICUS CURIAE

Pursuant to the provisions of Rule 42, the Lawyers' Selective Service Panel of San Francisco has obtained written consents from all parties to file this brief as *amicus curiae,* which consents have been filed with the Clerk (Stern and Gressman, SUPREME COURT PRACTICE, 4th Ed., 1969, p. 320, n. 85).

The Panel consists of a group of lawyers who, under appointment by the judges of the Northern District of California pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A, have represented

over two hundred young men of conscience prosecuted because of their refusals to be conscripted.

The members of the Panel have observed the long, and sometimes tortuous, road that their clients have travelled from the time when, before they were even out of their teens, they were first required to register, to the time when some of them realized, as a result of the devastating impact of the receipt of an order to report for induction, that they could not conscientiously participate in war. For others of them that realization came at an earlier point in time; that "circumstance" gave them an opportunity to attempt to persuade their local boards of the *bona fides* of their claims. But there are those for whom the actual receipt of the order itself was what catalyzed their nascent feelings into the stern command of conscience. These, unlike their brothers whose consciences had spoken earlier, found that before they could even be heard on their claims, they had to surmount the barrier imposed by the Selective Service Regulation involved in this case. And now they have been told, by a sharply divided Court of Appeals, that their local boards may not even consider their claims of conscience simply because their beliefs crystallized too late. *Ehlert v. United States*, 422 F. 2d 332 (9 Cir. 1970).

We believe that the decision below is insupportable as a matter of law. Its Draconian nature is utterly hostile to Anglo-American concepts of law. The regulation on which it is based does not require the narrow construction forced upon it by the majority below.

As construed below the regulation is not supported by (indeed, it is contrary to) the underlying statute. If the statute may be read to permit such a construction, then it itself violates the Constitution.

For these reasons, and on behalf of those of our clients who find themselves in petitioner's situation, we file this brief urging reversal of the judgment below.

The questions are (a) whether Selective Service Regulation 1625.2 (32 C.F.R. 1625.2), providing that a local board shall not reopen a classification after the mailing of a notice to report, unless it first finds that there has been a change in status resulting from circumstances over which the registrant has no control, precludes a board from even considering a conscientious objector claim merely because the claim was filed after the mailing of the notice to report; (b) if so, whether the regulation is contrary to Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. 456[j]); and (c) whether, if the act permits such a construction of the regulation, the act itself can be sustained against a challenge that it violates the First and Fifth Amendments to the United States Constitution.

It is our submission (a) that the regulation fairly construed, in the light of the policies expressed in the Selective Service Act, does not preclude a consideration of a claim of conscience filed after the mailing of an order to report; (b) that if, on the

other hand, it does preclude the consideration of such a claim, it is invalid as conflicting with Section 6(j) of the act; and (c) that if the act permits such a preclusion, it is unconstitutional.

SUMMARY OF ARGUMENT

1. A crystallization of a registrant's view on conscientious objection results in a change in his status from that of one who was not, to that of one who is, a conscientious objector. Such crystallization is of necessity a circumstance beyond the registrant's control. The proviso to Selective Service Regulation 1625.2 therefore does not, as a matter of law, preclude a local board from reopening a classification merely because the registrant submitted his claim for conscientious objector exemption after the mailing of the order to report for induction.

The view of the majority below that a registrant can control whether or when his conscience speaks to him is premised upon a notion of the nature of conscience which is at odds with this court's views. *Welsh v. United States,* ..... U.S. ....., 90 S.Ct. 1792, 38 U.S.L.Wk. 3486 (1970). Nor does the apprehension that full administrative review of such a claim might interfere with the operation of the Selective Service System justify the deprivation of the right to such review. *Mulloy v. United States,* ..... U.S. ....., 90 S.Ct. 1766, 34 U.S.L.Wk. 4509 (1970).

2. Since the statute, 50 U.S.C. App. 450(j), imposes no time limitation upon when a claim of consci-

ence must mature or be asserted, the regulation may not be construed so as to impose such a limitation on the claim.

3. A statute which distinguishes between registrants whose claims of conscience crystallize before and those whose claims of conscience crystallize after the receipt of an order to report for induction invidiously discriminates against the latter contrary to the requirements of the Fifth Amendment and violates their First Amendment rights as well.

ARGUMENT

I. SELECTIVE SERVICE REGULATION 1625.2 DOES NOT PRECLUDE A CONSIDERATION OF A CLAIM FOR CONSCIENTIOUS OBJECTOR STATUS MERELY BECAUSE THE CLAIM IS FILED AFTER THE MAILING OF AN ORDER TO REPORT

Judge Kilkenny's opinion for the majority below states:

> "We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. §1625.2" (422 F. 2d at 335).

While it is not clear from this whether the court is saying that a change from no objection to conscientious objection is not a change in status or whether it is saying that such a change is not one due to circumstances beyond the control of the registrant, a reading of all of the opinions below indi-

cates that the majority would probably accept as accurate the recent statement of the Court of Appeals for the Second Circuit that "ascension to conscientious objection is a change in status . . ." (*Paszel v. Laird*, ... F. 2d ....., [2 Cir. No. 34052, April 8, 1970], 2 S.S.L.R. 3591, 3592). It appears, rather, that the majority parts company with the Second Circuit when the latter holds that "the point in time when a registrant's beliefs form is a circumstance beyond his control" (*ibid.*, at 3592-3).

It is this failure to recognize that the registrant has control over neither the crystallization of his beliefs nor the point in time at which that occurs that is the fatal weakness of the majority opinion.[1]

---

[1]Judge Duniway's concurring opinion (422 F. 2d at 335), asserting that the word "circumstances" indicates "some fact, act or event external to the mind or conscience of the registrant" rather than the "internal mental and spiritual processes of the registrant" is not confirmed, as he suggests, by dictionary definitions.

Even those he cites do not support the dichotomy he seeks to create. Those he neglects to cite completely destroy his argument:

"1. Something attending, appendant or relevant to a fact or event, either incidentally, or as an essential condition or a determining factor, as the *circumstances* of TIME, place and person are to be considered (capitalization supplied);

2. One or more of the *adjuncts* of a fact, which make it more or less criminal (italics supplied). Webster's New Twentieth Century Dictionary. Unabridged 2d ed., New York 1965.

If, as Judge Duniway says, crystallization does not result from "circumstances," then either all post-notice conscientious objector claims are governed by Section 1625.2 without any reference to the proviso, since the latter would not be applicable to claims of such a nature (*cf., United States v. Crawford*, 119 F. Supp. 729 at 730 [N.D. Calif., 1954]), or such claims could never be reviewed, a result which, as Judge Merrill points out (422 F. 2d at 338), singles out conscientious objector claims alone for such treatment and, in addition, is contrary to the language of the statute (*ibid.*, at 339; and see, *infra*, II).

The holding that the maturation of a claim of conscience is not a circumstance over which a registrant has no control is based upon a misconception of the nature of such a claim and, indeed, of human psychology.

This Court has explicated the nature of a claim of conscience in terms which make clear the psychological unsoundness of the views expressed by Judge Kilkenny. In *Welsh v. United States*, ... U.S. ....., 90 S.Ct. 1792, 38 U.S.L.Wk. 4486 (1970) decided after the decision below was rendered, the conscience that would qualify for the exemption was described as one *"so loud and insistent* that [the registrant] preferred to go to jail rather than serve in the Armed Forces." This Court noted the necessary profundity, depth and sincerity of the qualifying belief and said that it had to be such as would *"impose* upon [the registrant] a duty of conscience to refrain from participating in any war at any time." Finally, it held that Section 6(j) exempts from service only those whose conscences, *"spurred* by deeply held moral, ethical or religious beliefs, *would give them no rest or peace* if they allowed themselves to become part of an instrument of war." (*Welsh v. United States, supra*, 90 S.Ct. at 1795, 1796, 1798; 38 U.S.L.Wk. at 4487, 4489; italics supplied)

To say that the maturation of beliefs of this intensity—and they must be of this intensity to entitle the registrant to the exemption—is a circumstance which is not beyond the control of the registrant is simply to misunderstand the psychological make-up of human beings.

> "This [the majority view] strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.
>
> Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." (Judge Merrill dissenting below, 422 F. 2d at 339).

In any case, it cannot be said that the contrary analysis of Judge Kilkenny is so indisputably sound on psychological grounds as to require a construction of the proviso to 1625.2, which, *as a matter of law,* precludes a local board from considering such a claim just because it crystallizes after, rather than before, the mailing of an induction notice.

The majority opinion is based not upon any tenable psychological analysis, but rather, to quote Judge Duniway, upon "practical considerations" (422 F.2d at 335). These considerations are specifically said to be that, if the post-notice maturation of conscientious objector belief may be regarded as a circumstance beyond the control of the registrant, then "[t]he manpower quotas of Selective Service could

not be met with any degree of certainty"[2] and "orderly administration of the Selective Service System" will not be possible.[3] (422 F. 2d at 334).

Similar arguments recently advanced by the Government have been squarely rejected by this court:

> "The Government argues that if the local board must reopen whenever a prima facie case for reclassification is stated by the registrant, he will be able to postpone his induction indefinitely and the administration of the Selective Service System will be undermined. But the board need not reopen where the claim is plainly incredible, or where, even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U.S.C., App. §462 (a)." (*Mulloy v. United States,* ..... U.S. ....., 90 S.Ct. 1766 at 1772, n. 7, 38 U.S.L.Wk. 4509 at 4511, n. 7 [1970]).

These factors are equally as applicable to a registrant whose beliefs crystallized upon the receipt of an order to report for induction as they are to a

---

[2]A proposition for which no evidence is to be found in the record. We are not aware that in the Second or Tenth Circuits where the proviso has been construed to include, as a change in status due to circumstances over which the registrant has no control, post-notice maturation of his conscientious objector beliefs (see cases cited, infra, p. 14), the Government has had any difficulty meeting Selective Service manpower quotas.

[3]Once again, no evidence supports this assertion and we have not heard that the application of a contrary reading of the regulation has resulted in any disorder in the administration of the Selective Service System in the Second or Tenth Circuits.

registrant whose beliefs crystallized at some earlier point in time and as a result of some other circumstance—such as reading a book or seeing a movie or hearing a sermon.

When the regulations dealing with reopening are read in their entirety and in the light of *Mulloy* it seems clear that the judgment below cannot stand. The regulations, so far as is here relevant, provide that a local board "may" reopen and consider anew a classification if there are presented to it new facts which, if true, would justify a change in classification (Section 1625.2); that it "shall not" reopen the classification if no new facts are presented or if the facts presented would not justify a change in classification (Section 1625.4); and that it "shall not" reopen a classification after an order to report has been mailed, "unless [it] first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (Section 1625.2, proviso).[4]

In *Mulloy*, a case involving the presentation of a conscientious objector claim prior to the mailing of an order to report, this Court held that, notwithstanding the permissive language of Section 1625.2,[5] a local

[4]The "crucial" difference between a reopening, even if a local board denies the requested reclassification, and a simple refusal to reopen was noted by this Court in *Mulloy*. In one situation the registrant has the right to a personal appearance and an administrative appeal; in the other he is not accorded those rights.

[5]And, necessarily, the mandatory language of that section's counterpart. For while this Court in *Mulloy* spoke primarily to Section 1625.2, it recognized that under Section 1625.4 a board "need not reopen" if no new facts are presented or if such facts would not justify a change in classification (*Mulloy v. United States, supra*, 90 S.Ct. at 1769, 38 U.S.L.Wk. at 4510).

board may not "arbitrarily refuse to reopen a registrant's classification," that its failure to reopen in a proper case constitutes "an abuse of discretion," and that the denial of a claim to reopen in the face of a *prima facie* showing is "an evaluative determination" that "cannot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal." The principal reason assigned for reaching this conclusion was the overriding fact that in selective service criminal prosecutions there is only a "narrowly limited scope of judicial review available to a registrant" and that, therefore, "the opportunity for full administrative review is indispensable to a fair operation of the Selective Service System." (*Mulloy v. United States, supra,* 90 S.Ct. at 1771, 38 U.S.L.Wk. at 4509).

In the opinion below, rendered before *Mulloy* was decided, no valid reason was assigned for requiring any lesser opportunity for full administrative review in a case in which the claim was made after, rather than before, the mailing of the order to report. As we have seen, the same "mandatory" language—"shall not"—appearing in the proviso to Section 1625.2 appears also in Section 1625.4, involved in *Mulloy*. If the "shall not" in the latter section does not preclude reopening in a proper case, the "shall not" in the proviso to 1625.2 ought not to have that effect either. As we have further seen, neither the psychological basis for the opinion of the majority below nor its arguments of administrative convenience can survive analysis.

There is thus nothing which requires the proviso to 1625.2 to be construed in any way other than to require a local board in a case such as this to determine whether there has been a change in status due to circumstances beyond the registrant's control, and where, as here, a *prima facie* case to that effect has been presented, to reopen the classification and thereby accord to the registrant the right of an appearance and an administrative appeal.[6] This, of course, does not mean that in every case of post-notice filing (or, indeed, in every case of a pre-notice filing) the local board is required to reopen and reclassify.[7] It does mean that the proviso to 1625.2 need not and should not be construed to preclude a board from reopening merely because the claim matured one day after,

---

[6] *Amicus curiae* believes that the instant record sustains Judge Merrill's position that there was no issue in this case of any deficiency in the petitioner's showing (422 F. 2d at 338, n. 1). Indeed the trial judge made it clear that

> ". . . if there [sic] were a case in [the Second] Circuit, I would feel, *based on the record before me*, I would have to acquit the accused." (TR 31: 21-23; italics supplied).

And the local board specifically told petitioner that it was refusing to reopen his classification only because

> ". . . the information submitted on Selective Service System Form 150 was not a change in status which was beyond your control" (422 F. 2d at 333).

Judge Ely's attempt (422 F. 2d at 335) to decide the case on some other basis is thus not sustainable on this record.

In any case, the majority below decided, as a matter of law, that the regulation precluded a reopening and the issue therefore is squarely presented here.

[7] Indeed, neither the Second Circuit nor the Tenth has had any problem in sustaining a criminal conviction where the file shows a basis in fact for the board's refusal to reopen on the ground that the claimed belief arose prior to the induction order. *United States v. Delfin*, 419 F. 2d 226 [2 Cir., 1969]; *United States v. Maine*, 417 F.2d 951 (10 Cir. 1969).

rather than one day before, the mailing of the notice to report.

Since it must be true that there are at least some post-notice situations in which a reopening may be justified,[8] the regulation should not be construed as precluding the board from undertaking to ascertain whether or not the claim falls into one of those categories. If the board rejects the claim, after making such a determination, and if there is a basis in fact for its finding, that is one thing; but the court below should not have construed the regulation so as to prohibit the board from conducting such an examination. Its holding that, *as a matter of law,* crystallization can never be a change in status resulting from circumstances over which the registrant has no control is plainly erroneous.

II. SECTION 6(j) DOES NOT IMPOSE ANY LIMITATION UPON THE TIME WHEN A CONSCIENTIOUS OBJECTOR CLAIM MUST MATURE OR MUST BE ASSERTED

Section 6(j) of the Military Selective Service Act of 1967 and its predecessors express a deeply-rooted national policy that persons who are conscientiously

---

[8]For example, in *Paszel v. Laird,* ..... F. 2d ....., *supra,* the court points out that, in the case of a claim made after a notice of induction, there are four possible combinations of facts, one of which—no conscientious objection before but conscientious objection after—would require the board to reopen. We need not attempt to rehearse all the situations which might or might not justify a post-induction notice reopening. All we urge here is that a local board should not be precluded as a matter of law from determining whether or not it should even consider reopening in such a case.

opposed to participation in war shall not be subjected to combatant training and service. It does not impose upon such persons any limitation upon the time within which such a claim must mature or must be asserted. On its face, the statute expresses an unambiguous mandate that no conscientious objector shall be required to serve in the armed forces. Since it does not impose a time limitation within which the claim must arise or must be made, a regulation which, on its face or as construed, purports to impose such a limitation must be stricken down as an effort to engraft upon a statutorily created exemption a condition not imposed by Congress. It is beyond the rule-making power of the executive to impose such a condition upon the exercise of a right granted by the statute (*United States v. Gearey*, 368 F. 2d 144 [2 Cir., 1966]; *United States v. Sandbank*, 403 F.2d 38 [2 Cir., 1968]; *Keene v. United States*, 266 F. 2d 378 [10 Cir., 1959]; *Martinez v. United States*, 384 F. 2d 50 [10 Cir., 1967]; *United States v. Maine*, 417 F. 2d 951 [10 Cir., 1969]; *United States v. Clark*, 105 F. Supp. 613 [W.D. Pa., 1952]; *United States v. Crawford*, 119 F. Supp. 729 [N.D. Calif., 1954]; *United States v. Underwood*, 151 F. Supp. 874 [E.D. Pa. 1955]; *United States v. Hinch*, 292 F. Supp. 696 [E.D. Mo., 1968]).

In *Gearey, supra*, the Court of Appeals for the Second Circuit said:

> "Section 6(j) does not set any time limit by which an applicant's conscientious objection must be fully crystallized in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his

notice, although the belatedness of the claim may be a factor in assessing its genuineness." (368 F. 2d at 149-150).

In *Sandbank, supra,* it said:

"A registrant may have his application for conscientious objector status considered by the Local Draft Board even after the induction notice is issued provided he raises his claim promptly after it matures." (403 F.2d at 38).

In *Keene, supra,* the Court of Appeals for the Tenth Circuit said:

"Our question then is narrowed to whether the appellant is entitled to have his classification reopened and considered anew on the grounds of a change of status due to circumstances beyond his control. That is to say, a change of status due to a change of conscience occurring after the notice to report was mailed. If such change did occur, the board erroneously refused to reopen and review . . . (266 F. 2d at 384).[9]

Finally, in *Maine, supra,* it said:

". . . no circumstance not subjectively controlled, which could, *under law,* affect the draft status of a registrant can justifiably be excluded

[9]In the subsequent case of *Martinez v. United States, supra,* the same Court of Appeals noted, with apparent approval, that the trial judge had submitted this issue to the jury (384 F. 2d at 51). We need not concern ourselves here with whether the issue of fact presented is one for the court or the jury, as in the instant case the trial was to the court alone which, while resolving the fact issue in favor of petitioner, held, as a matter of law, that petitioner had to be found guilty solely because his sincere beliefs matured after the mailing of the order. See *supra,* n. 6.

from consideration." (417 F. 2d at 954; italics supplied).

In each opinion the court carefully observed that the lateness of the claim is a factor legitimately to be considered in assessing its sincerity. With this, of course, we have no quarrel. But each court made it equally clear that, as the statute is drafted, lateness *per se* is not to be regarded as a disqualifying factor. Yet, as construed by Judge Kilkenny, the proviso to Section 1625.2 has precisely the effect of imposing a time limit on the right granted by Congress.

While the statute authorizes the issuance of implementing regulations, that authorization is limited to the promulgation of only such regulations as are necessary "to carry out the provisions of this Act." (50 U.S.C. App. 460 [b][1].) The statute obviously does not authorize regulations which have the effect of destroying the very exemptions it grants.

In *Crawford, supra,* the Court said:

> "The statute . . . expressly provides [for the conscientious objector exemption] . . . the sole legal question . . . is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it. While Regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection whenever made so as to deprive the objector of a hearing at which he may prove his good faith." (119 F. Supp at 730).

Furthermore, the statute explicitly provides that "*Nothing* contained herein" shall require a conscien-

tious objector to serve in the armed forces. (50 U.S.C. App. at 456[j]; italics supplied). In the face of this, Congress could not have intended to authorize a regulation which, either on its face or as construed, would compel a conscientious objector to serve or go to jail just because his claim did not mature until after the board mailed him a notice to report. Yet, as applied by the court below, this is precisely what Section 1625.2 does. This construction of the section must be declared by this Court to be invalid as contravening the statutory grant of exemption to conscientious objectors.

III. IF SECTION 6(j) PERMITS THE IMPOSITION OF A TIME LIMITATION UPON THE MATURATION OF A SINCERE CONSCIENTIOUS OBJECTOR CLAIM, THEN IT IS UNCONSTITUTIONAL AS VIOLATIVE OF THE FIFTH AND FIRST AMENDMENTS

There is no question but what the statute as construed below "creates two classes [of registrants] indistinguishable from each other" except that in the one case the claim of conscience matured prior to, and in the other case after, the mailing of the order to report. This is an "invidious discrimination" which denies to petitioner, and those of his class, the equal protection of the laws (*Shapiro v. Thompson,* 394 U.S. 618, 627 [1969]). *Cf. Bolling v. Sharpe,* 374 U.S. 497 [1954]).[10]

---

[10]The "administrative" reasons assigned for the discrimination will not support it (*Mulloy v. United States, supra,* 90 S.Ct. at 1772, n. 7, 38 U.S.L.Wk. at 4511, n. 7), nor will any others. See pages 7-11, *supra.*

As Mr. Justice Harlan has observed:

> "If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, [all] those whose beliefs emanate from a purely moral, ethical and philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held." (*Welsh v. United States, supra,* 90 S.Ct. at 1806, 38 U.S.L. Wk. at 4493; concurring opinion).

And this is true whether or not the conscientious objection exemption is deemed to be required by the First Amendment or to be dependent on the will of Congress (*Sherbert v. Verner,* 374 U.S. 398 [1963]; *Speiser v. Randle,* 357 U.S. 513 [1948]; *cf. Skinner v. Oklahoma,* 316 U.S. 535, 541 [1942]; *United States v. Seeger,* 326 Fed. 2d 846, 851 [2 Cir., 1964]; affirmed, 380 U.S. 163 [1965]).

Petitioner, whose beliefs happened to mature after the mailing of the order to report, is nonetheless in the class encompassed within the exemption. The "denominator" of an intensely held belief is as "common" to him as it is to those registrants whose beliefs matured at an earlier date. To exclude petitioner from the benefits of the statutory exemption while granting it to others in the same class is to deprive him of the equal protection of the laws and is to render the statute itself violative of the provisions of the First Amendment.

Finally, if the statute may be read to permit the regulation to affect the claim of exemption depending upon whether it is asserted before or after the registrant's receipt of an order or before or after the registrant has acquired knowledge that an order has been issued, it would be inapplicable or invalid for the reasons already set forth. But when the regulation purports to deprive a registrant of conscientious objector status solely because of the time when the order was *mailed,* it (or the statute upon which the regulation is based) must be condemned also as a violation of the Due Process Clause of the Fifth Amendment. The fact that the board has mailed a notice has no reasonable relation to the question of whether the registrant's beliefs do or do not entitle him to the exemption. To make the resolution of that question turn on the fact of mailing is both arbitrary and capricious.

CONCLUSION

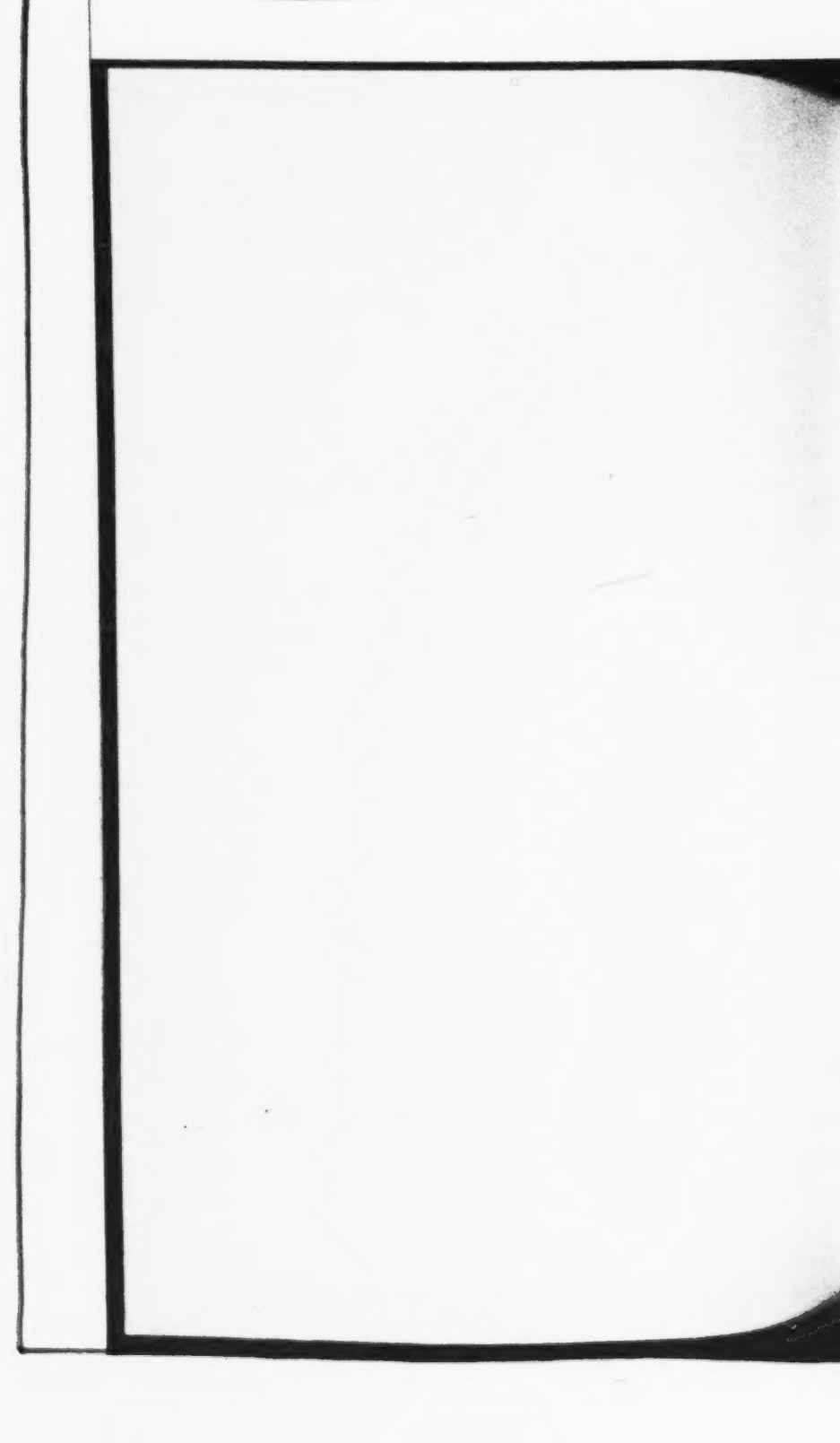
For the foregoing reasons, the judgment below should be reversed.

Dated, San Francisco, California,
July 27, 1970.

Respectfully submitted,

NORMAN LEONARD,
Lawyers' Selective Service Panel
of San Francisco,
Attorney for Amicus Curiae.

RICHARD L. PATSEY,
MARJORIE H. LEONARD,
PETER A. HUNT,
Lawyers Selective Service Panel
of San Francisco,
Of Counsel.



Subject Index

Page

Statement of the case 1

Opinions below 3

Jurisdiction 3

Question presented 3

Constitutional, statutory and regulatory provisions involved 4

Summary of the argument 5

Argument 8

I. The language of the regulation must be construed to include conscientious objection which crystallizes after the issuance of an induction order as a change of status resulting from circumstances beyond the control of a selective service registrant 8

A. A sincere belief against participation in war in any form acquired after mailing of an induction order must be considered to be a change in the registrant's status resulting from circumstances over which the registrant had no control 9

1. The Gearey Court, and the Ehlert dissenters, correctly reasoned that crystallization of conscientious objection results from circumstances beyond a registrant's control 9

2. The Gearey rule is supported by traditional religious conversion experiences and modern psychoanalytic interpretation of similar phenomena 11

3. The time-honored national policy expressed in section 6(j) which exempts conscientious objectors requires that any regulation concerning conscientious objection be consistent with and authorized by that section 15

4. Under the majority holding below, a registrant who acquires beliefs against war after his order to report for induction is mailed but before his reporting date is forever precluded from asserting his claim 21

Page

5. Judge Duniway's concurring opinion in the case below misconceives the nature of the term "circumstance" in 32 C.F.R. § 1625.2 24

6. The record in this case clearly presents both the substantive and procedural issues which underlie a correct interpretation of the regulation 25

II. The result urged by petitioner places no significant burden on selective service, and cannot conceivably disrupt the manpower requirements of the military 27

Conclusion 34

Table of Authorities Cited

Cases

Pages

Bolling v. Sharpe, 347 U.S. 497 (1954) 23
Breen v. Selective Service Board, 396 U.S. 468 (1970) 18, 19

Capobianco v. United States, ... F.2d ....., No. 34,139 (2d Cir. Mar. 31, 1970) 8

Dickinson v. United States, 346 U.S. 389 (1953) 22

Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970) ...passim

Keene v. United States, 266 F.2d 378 (10th Cir. 1959) 8

Lurie v. United States, 402 F.2d 297 (5th Cir. 1968)..... 21

Marsano v. Laird, 412 F.2d 65 (2d Cir. 1969) 29
Miller v. United States, 294 U.S. 435 (1935) 17
Mulloy v. United States, ... U.S. ....., No. 665, October Term, 1969, June 15, 1970 21

Pages

Oestereich v. Selective Service Local Board No. 1, 393 U.S. 233 (1968) 18, 19

Olson v. United States, ... F.2d ....., 2 Sel.Serv.L.Rep. 3637 (9th Cir. 1970) 21

Olvera v. United States, 223 F.2d 880 (5th Cir. 1955) 21

Petrie v. United States, 407 F.2d 267 (9th Cir. en banc 1969) 24

Quaid v. United States, 386 F.2d 25 (10th Cir. 1967) 20, 21

Schmitt v. United States, 413 F.2d 219 (5th Cir. 1969), cert. denied ..... U.S. ....., 24 L.Ed.2d 423 (1969) 21

Shapiro v. Thompson, 394 U.S. 618 (1969) 23

Sherbert v. Verner, 374 U.S. 398 (1963) 23

Skinner v. Oklahoma, 316 U.S. 535 (1942) 23

Stain v. United States, 235 F.2d 339 (9th Cir. 1956) 21

Toussie v. United States, ... U.S. ....., 38 U.S.L.Week 418 (1970) 18, 19

Trust Under the Will of Bingham v. Commissioner, 325 U.S. 365 (1944) 7

United States v. Al-Majied Muhammad, 364 F.2d 223 (4th Cir. 1966) 8

United States v. Beaver, 309 F.2d 273 (4th Cir. 1962) cert. den. 371 U.S. 951 (1963) 8, 11

United States v. Bittinger, No. 13,317 (4th Cir. Dec. 24, 1969) 8

United States v. Blakeley, 424 F.2d 1043 (9th Cir. 1970).. 8

United States v. Freeman, 388 F.2d 246 (7th Cir. 1967).. 21

United States v. Gearey, 368 F.2d 144 (2d Cir. 1966), 379 F.2d 915 (2d Cir. 1967, cert. den. 389 U.S. 959 (1967) passim

United States v. George, 228 U.S. 14 (1912) 17

United States v. Gutknecht, 396 U.S. 295 (1970) 18, 19

United States v. Haughton, 413 F.2d 736 (9th Cir. 1969) 32

United States v. Jennison, 402 F.2d 51 (6th Cir. 1968), cert. denied 394 U.S. 912 (1968) 8

United States v. Nugent, 346 U.S. 1, 12-13 (1953) 34

United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), cert. den. 394 U.S. 961 (1969) 8

United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953) 8

Pages
United States v. Seeger, 380 U.S. 163 (1965) 10, 15, 16, 17
United States v. Stafford, 389 F.2d 215 (2d Cir. 1968) 8
United States v. Taylor, 351 F.2d 228 (6th Cir. 1965) 8
United States v. Underwood, 151 F.Supp. 874 (E.D.Pa. 1955) 19, 20
United States v. Vincelli, 216 F.2d 681 (2d Cir. 1954) 21

Welsh v. United States, ... U.S. ..... (1970), 38 U.S.L. Week 4486 (June 16, 1970) 10
Witmer v. United States, 348 U.S. 375 (1955) 22

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 17

Constitutions

United States Constitution:
First Amendment, Freedom of Religion clause 4, 23
Fifth Amendment, Due Process clause 4, 23

Statutes

32 Code of Federal Regulations:
Section 1622.13(f)(2)(3) 29
Section 1622.15(b) 29
Section 1622.17 .....16, 29
Section 1622.22 29
Section 1622.23 29
Section 1622.30(b) 24
Section 1622.40 17
Section 1622.40(a)(10) 29
Section 1622.42(c) 29
Section 1624.1 31
Section 1625.2 .....2, 3, 4, 5, 6
Section 1626 31
Section 1631.4 27
Section 1631.5 27
Section 1631.7(a) 27, 32
Section 1631.7(b) 27, 28, 33
Section 1631.8 20
Section 1632.1 27
Section 1632.9 29

	Pages
Section 1642.4	29
Section 1622.44	16
Section 1642	18
Military Selective Service Act of 1967:	
Section 1(c)	17
Section 5	18
Section 6	18
Section 6(c)(2)(D)	20
Section 6(j)	passim
Section 10	18
Section 10(b)(1)	5
Section 10(f)(3)	17
28 U.S.C., Section 1254(1)	3
50 U.S.C. App.:	
Section 456(c)(2)(O)	20
Section 456(h)	16
Section 456(j)	4, 7, 19, 32
Section 456(o)	17
Section 460	17
Section 460(b)(1)	5
Section 462	2
Section 462(a)	32

Texts

9 Acts, pp. 3-6	12
Aiken, The Dhamma of Gotama the Buddha and the Gospel of Jesus the Christ, Marlier & Co. Ltd., 1900, p. 72	13
Augustine, The Confessions, Books I-IX, trans. F.J. Sheed, (Sheed & Ward, 1942), p. 146	13
Augustine, op. cit., n. 17, p. 141	15
6 Catholic Encyclopedia, p. 222 (1913)	13
James, The Varieties of Religious Experience, New Am. Lib. 1961, p. 162	12
C. J. Jung, "Approaching the Unconscious," in Man and His Symbols, ed. C. G. Jung, Dell, 1969, p. 22	15

Pages

Luther, Table Talk, 54 Luther's Works, ed. and trans. Tappert, Fortress Press, 1967, pp. 193-94 14

Ninth Circuit Review, Selective Service, 21 Hastings L.J., pp. 1038, 1043 (1970) 21

Pre-induction Availability of the Right to Claim Conscientious Objector Exemption, 72 Yale L.J., p. 1459, 1963.. 21

Salzman, "Religious Conversion," in Clinical Psychiatry and Religion, Pattison, ed., 1969, p. 177 12

The 1967 Selective Service Amendments, P.L. 90-40, 81 Stat. 100 32

Todd, Martin Luther, 1964, p. 78 14

72 Yale L.J., p. 1467 32

Miscellaneous

Army Reg. 601-270, pars. 3-18(b)(4), 4-20(2), 4-21 24

Department of Defense Directive No. 1300.6 ..... 4, 22

Local Board Memorandum No. 44, as amended Dec. 29, 1961, 1 Sel.Serv.L.Rep., p. 2175 29

Medical Statistics Agency, Supplement to Health of the Army, Results of the Examination of Youth for Military Service, 1968 (Dept. of the Army, 1969) 33

1 Sel.Serv.L.Rep., pp. 2224, 2265-66 29

1 Sel.Serv.L.Rep., p. 3210 23

3 Sel.Serv.L.Rep., p. 3001, June 16, 1970 10

State Director Advice No. 763, as amended Oct. 2, 1969, 2 Sel.Serv.L.Rep., p. 29 29

State Headquarters, Sel.Serv. System, Sacramento, California, Operation Memorandum (Class.) May 21, 1970 28

State Headquarters, Sel.Serv. System, Raleigh, North Carolina, Circular Letter No. 111-4-a 28

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

Petitioner, a Selective Service registrant, was classified I-A by his local board on March 3, 1964. On June 16, 1964, he was ordered to report for induction (Appendix [hereinafter A.] 50). Before his induction date he wrote to his local board requesting conscientious objector status, stating that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so" (A. 51). On January 19, 1966, the local board declined to reopen petitioner's classification (A. 59). In response

to petitioner's inquiry the board advised him by letter that it had declined to reopen his classification because his claim to conscientious objection "was not a change in your status which was beyond your control" (A. 61). Petitioner's induction order was renewed, and he refused to submit to induction.

Petitioner was indicted in the District Court for the Northern District of California for violating 50 U.S.C.App. section 462 (A. 7-9). He was tried by the Court, found guilty, and sentenced to two years' imprisonment (A. 6). The central issue at petitioner's trial was whether the crystallization of his claim to conscientious objection after an induction order was "a change in the registrant's status resulting from circumstances over which the registrant had no control," within the meaning of 32 C.F.R. §1625.2. The District Court held that it was not, although the Court stated that if it had been sitting in the Second Circuit where the opposite rule prevails, it would have been bound to acquit petitioner (A. 22).

The majority of the panel of the Court of Appeals for the Ninth Circuit which heard petitioner's appeal took the view that the crystallization of petitioner's claim *was* such a change in status, and accordingly entered an order and opinion reversing his conviction on September 11, 1968 (A. 25-28). 1 Sel.Serv. L.Rep. 3210. On October 23, 1968, the judgment was recalled and the appeal set to be heard en banc (A. 29-30). On February 2, 1970, the entire Court entered a judgment and opinion affirming petitioner's conviction by a vote of eight to five, the majority

holding that the District Court had correctly applied section 1625.2. 422 F.2d 332 (A. 31 et seq.).

A petition for writ of certiorari was granted by this Court on May 4, 1970. 38 U.S.L.Week 3430.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, sitting en banc, is reported at 422 F.2d 332 and at A. 31. An earlier and contrary panel opinion, not officially reported, is at 1 Sel.Serv. L.Rep. 3210 and at A. 25. The United States District Court for the Northern District of California did not render a written opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals was entered on February 2, 1970, 422 F.2d 332. The petition for writ of certiorari was filed on March 27, 1970, and was granted on May 4, 1970.

QUESTION PRESENTED

Whether Selective Service Regulation 32 C.F.R. § 1625.2 can validly preclude a local board from considering a registrant's claim of conscientious objection because it crystallized after the mailing of an order to report for induction.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment, Freedom of Religion clause:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

United States Constitution, Fifth Amendment, Due Process clause:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law.

Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j):

> (j) Conscientious Objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Selective Service Regulations, 32 C.F.R. § 1625.2:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Department of Defense Directive No. 1300.6:

> A request for discharge after entering military Service based solely on conscientious objection

which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim.

SUMMARY OF THE ARGUMENT

32 C.F.R. §1625.2 (referred to throughout as "the Regulation") was promulgated by the Director of Selective Service, under the purported authorization of section 10(b)(1) of the Military Selective Service Act of 1967.[1] That section authorizes the President "to prescribe the necessary rules and regulations to carry out the provisions of this title." The Regulation, in pertinent part, states that:

> The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

The court below in construing the Regulation held that crystallization of conscientious objector beliefs can never be "a change in status resulting from cir-

---

[1] 50 U.S.C. App. § 460(b)(1).

cumstances over which the registrant has no control" entitling the registrant to have his classification reopened.[2]

Petitioner urges that this construction is in error and that conscientious objection which matures after mailing of an induction order is "a change in status resulting from circumstances over which the registrant had no control."

The majority below reasoned as follows: First, that the acquisition of conscientious objector beliefs is within a registrant's control; second, that fraudulent claims for conscientious objector status made after induction orders have been issued might disrupt the orderly administration of the Selective Service system and make it impossible for local boards to meet manpower quotas. Judge Duniway, concurring, takes the position that crystallization of conscientious objector beliefs cannot result from circumstances over which a registrant has no control, since the workings of the human mind cannot be termed a "circumstance."[3] Judge Ely, also concurring, felt that the representations made by Ehlert in his claim for conscientious objector status could not support a finding by the local board that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystallized after his receipt of his notice to report for induction.[4]

---

[2] *Ehlert v. United States*, 422 F.2d 332 (9th Cir. 1970) (A. 31).

[3] *Ehlert v. United States*, 422 F.2d 332, 335 (9th Cir. 1970) (A. 35).

[4] *Id.*, at 335 (A. 36).

Petitioner maintains that claims which mature after mailing of an order to report for induction must be considered and reopened in appropriate cases for the following reasons: First, this is the only reasonable interpretation that can be reached based on the language of the Regulation, on the nature of conscience and the religious experience, and on modern concepts of psychology. Second, this result is compelled by the time-honored national policy affording a high degree of protection to conscientious objectors. Third, section 6(j) of the Act,[5] which is mandatory and unambiguous, requires the conscientious objector exemption to be paramount to any limiting regulation. Fourth, the decision below creates a "no-man's land," denying the statutory protection to one class of conscientious objectors which the laws grant to all others, in a manner neither fair nor reasonable. Petitioner further contends that Judge Ely's findings are unjustified based on the record before the court below and the action of the draft board.

Petitioner also urges that the administrative burden and effect on manpower requirements which may flow from this construction is slight, since Selective Service has existing procedures for accommodating postponements and cancellations of induction orders in many other situations. Any additional burden created is far outweighed by protection of the rights of conscientious objectors claiming exemption from military service.

---

[5] 50 U.S.C. App. § 456(j), Military Selective Service Act of 1967, § 6(j) (hereinafter "§ 6(j)").

ARGUMENT

I. THE LANGUAGE OF THE REGULATION MUST BE CONSTRUED TO INCLUDE CONSCIENTIOUS OBJECTION WHICH CRYSTALLIZES AFTER THE ISSUANCE OF AN INDUCTION ORDER AS A CHANGE OF STATUS RESULTING FROM CIRCUMSTANCES BEYOND THE CONTROL OF A SELECTIVE SERVICE REGISTRANT.

The question before the Court is whether the crystallization of conscientious objector beliefs after the mailing of an order to report for induction can never be a change in status resulting from circumstances beyond the control of the registrant. This question has created widespread conflict among the Courts of Appeals. The leading case which expresses the rule urged by petitioner is *United States v. Gearey.*[6]

---

[6]368 F.2d 144 (2d Cir. 1966), 379 F.2d 915 (2d Cir. 1967) (*after remand*), *cert. denied* 389 U.S. 959 (1967).

Accord: United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States v. Stafford,* 389 F.2d 215 (2d Cir. 1968); *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959); and *Capobianco v. United States,* ..... F.2d ....., No. 34,139 (2d Cir. Mar. 31, 1970). In addition to other authority in the District Courts, there is the dissent of Judge Bell in *United States v. Beaver,* 309 F.2d 273, 278 (4th Cir. 1962), *cert. denied* 371 U.S. 951 (1963); the dissent of Judge McCree in *United States v. Jennison,* 402 F.2d 51, 54 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1968); and the statement of Judge Tuttle, Senior United States Circuit Judge for the Fifth Circuit in *United States v. Blakeley,* 424 F.2d 1043, 1045 (9th Cir. 1970) that he would associate himself with the dissenters in *Ehlert.* See also *United States v. Bittinger,* No. 13,317 (4th Cir. Dec. 24, 1969). There the Court found the local board had erred in not hearing the registrant's claim of ministerial status arising after an order to report for civilian work had been mailed, saying, "[T]he call to a full-time vocation in the ministry comes to comparatively few men, and the reasons this call may be answered are too complex to be fathomed by perfunctory administrative decision."

Contra: The leading cases which agree with the *Ehlert* majority are *United States v. Beaver, supra; United States v. Jennison, supra; United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953); *United States v. Taylor,* 351 F.2d 228 (6th Cir. 1965); and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

The rule of the *Gearey* Court is simple and straightforward. Conscientious objector beliefs which mature after an Order to Report for Induction has been mailed are a change of status resulting from circumstances over which a registrant has no control. Using this test, if the local board finds that the registrant's beliefs ripened only after an induction order has been mailed and that his beliefs prima facie qualify him for classification as a conscientious objector, then a change in status has occurred "resulting from circumstances over which the registrant had no control" and he would be entitled to be reclassified by the local board. If the registrant does not make the required showing, under the Regulation the board is free to refuse to reopen the classification and to leave the induction order in effect.

A. A Sincere Belief Against Participation in War in Any Form Acquired After Mailing of an Induction Order Must be Considered to be a Change in the Registrant's Status Resulting From Circumstances Over Which the Registrant Had No Control.

1. The Gearey Court, and the Ehlert dissenters, correctly reasoned that crystallization of conscientious objection results from circumstances beyond a registrant's control.

The view of conscience expressed by the Court below conflicts with the fundamental nature of such a claim. The majority declared that "Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking."[7]

Dictates of conscience are matters beyond will, control and presumption. It is this presumption, expressed

[7] *Ehlert v. United States*, 422 F.2d 332, 334 (9th Cir. 1970) (A. 34).

by the *Ehlert* Court, which led to its conclusion. But it is unsound as an unquestioned starting point. The nature of conscience is a difficult question, and it may not be thus begged.

There are volumes of authority for the proposition that man is not entirely rational, that his possession of free will cannot be assumed, and that his thought processes are not his to control. This honorable Court has said that the nature of a belief adequate to support a claim for conscientious objection is one ". . . upon which all else is ultimately dependent."[8]

A belief so held, by its very definition, is not entertained at will; "conscience" and "control" mutually exclude one another.

Judge Merrill, dissenting below, clearly perceives the nature of conscience. He said,

> One simply cannot order his conscience be still or make himself believe what he does not believe . . .
>
> Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.[9]

Judge Kaufmann, in his opinion in *Gearey,* noted the impact that an Order to Report might have upon one whose conscientious objector position was still inchoate:

---

[8]*United States v. Seeger,* 380 U.S. 163, 176 (1965); *Welsh v. United States,* ..... U.S. ..... (1970), 38 U.S.L.Week 4486 (June 16, 1970), 3 Sel.Serv.L.Rep. 3001 (June 16, 1970).

[9]*Ehlert v. United States,* 422 F.2d 332, 339 (9th Cir. 1970) (A. 46).

> The realization that induction is pending, and that he soon may be asked to take another's life, may cause a young man to finally crystallize and articulate his once vague sentiments.[10]

Many registrants who have raised their conscientious objector beliefs only after the issuance of an induction order have chosen jail rather than to submit to induction—belatedly testifying to the sincerity with which they hold their belief. It does not serve this nation well to send to prison those who sincerely hold beliefs against participation in war in any form, whenever matured. Circuit Judge Bell articulated the result which flows from the *Ehlert* majority, when he said:

> The statute gives this man exemption, the Army does not want him, the jail will not change his religious beliefs, nor will the will of the people to fight for their country be sapped by a generous adherence to the philosophy behind this law.[11]

2. The Gearey rule is supported by traditional religious conversion experiences and modern psychoanalytic interpretation of similar phenomena.

Petitioner's contention that conscience is beyond the control of the human mind finds support in the timeless religious experience of conversion, and the corpus of modern psychology holds this position as basic.

Over a lifetime men change their views, some gradually, some suddenly. "Religious conversion is a specific instance of the general principle of change in

---

[10]368 F.2d 144, 150.

[11]*United States v. Beaver*, 309 F.2d 273, 279 (4th Cir. 1962) (dissenting opinion), *cert. denied* 371 U.S. 951 (1963).

the process of human adaptation. Conversion is a generic term for change and generally implies a drastic alteration of a former state."[12]

Chambers, J., concurring below, saw the analogy to Saul of Tarsus in his reference to "the road to Damascus":[13]

> Now as he journeyed he approached Damascus, and suddenly a light from heaven flashed about him, and he fell to the ground and heard a voice saying to him, "Saul, Saul, why do you persecute me?" And he said, "Who are you, Lord?" And he said, "I am Jesus, whom you are persecuting; but rise and enter the city, and you will be told what to do."[14]

The story of the conversion of St. Paul is told in the exalted language of religious metaphors. Yet it is paradigmatic of a crystallization of previously inchoate ideas and feelings around some stimulus, into a coherent and stable structure. This common process is quite inconsistent with the notion that every human is at all times in complete charge of his own thinking.

As William James described it,

> We have a thought, or we perform an act, repeatedly, but on a certain day the real meaning of the thought peals through us for the first time, or the act has suddenly turned into a moral impossibility.[15]

---

[12]Salzman, "Religious Conversion," in *Clinical Psychiatry and Religion* (Pattison, ed., 1969) 177.

[13]*Ehlert v. United States,* 422 F.2d 332, 338 (9th Cir. 1970) (A. 43).

[14]9 Acts. 3-6.

[15]James, *The Varieties of Religious Experience* (New Am. Lib. 1961) 162.

Instances of sudden crystallization of belief are legion. The following are only a few examples. Legend teaches that the sight of a beggar precipitated the conversion of both Francis of Assisi and the Gautama Buddha from sybarites to saints.[16]

In the Confessions of St. Augustine we read,

> Suddenly I heard a voice from some nearby house, a boy's voice or a girl's voice, I do not know; but it was a sort of sing-song, repeated again and again. "Take and read, take and read . . ." Damming back the flood of my tears I arose, interpreting the incident as quite certainly a divine command to open my book of scriptures and read the passage at which I should open. I snatched it up, opened it and in silence read the passage upon which my eyes first fell: Not in rioting and drunkenness, not in chambering and impurities, not in contention and envy, but put ye on the Lord Jesus Christ and make not provision for the flesh in its concupiscences [Rom. XIII, 13]. I had no wish to read further, and no need. For in that instant, with the very ending of the sentence, it was as though a light of utter confidence shone in all my heart, and all the darkness of uncertainty vanished away.[17]

The struggles of Martin Luther with the problem of divine justification were suddenly resolved in a tower at Wittenberg and led ultimately to his ninety-nine theses:

---

[16]6 Catholic Encyclopedia 222 (1913); Aiken, *The Dhamma of Gotama the Buddha and the Gospel of Jesus the Christ* (Marlier & Co. Ltd., 1900) p. 72.

[17]Augustine, *The Confessions*, Books I-IX, trans. F.J. Sheed (Sheed & Ward, 1942), 146.

> The words "righteous" and "righteousness of God" struck my conscience like lightning. When I heard them I was exceedingly terrified. If God is righteous (I thought), he must punish. But when by God's grace I pondered, in the tower and heated room of this building, over the words, "He who through faith is righteous shall live" [Rom. 1:17] and "the righteousness of God" [Rom. 3:21], I soon came to the conclusion that if we, as righteous men ought to live from faith and if the righteousness of God should contribute to the salvation of all who believe, then salvation won't be our merit but God's mercy. My spirit was thereby cheered . . . The Holy Spirit unveiled the Scriptures for me in this tower.[18]

In another account of this experience he said:

> This immediately made me feel as if I was reborn, and as though I had entered through open gates into paradise itself. From then on, the whole face of Scripture appeared different.[19]

That the mind is not the master of the conscience is the teaching of both contemporary psychology and of religious philosophers:

> Many people mistakenly overestimate the role of will power and think that nothing can happen to their minds that they do not decide and intend. But one must learn to discriminate carefully between intentional and unintentional contents of the mind. The former are derived from the ego personality; the latter, however, arise from a

[18]Luther, *Table Talk*, 54 *Luther's Works* (ed. and trans. Tappert, Fortress Press, 1967), 193-94.

[19]Todd, *Martin Luther* (1964), 78.

> source that is not identical with the ego but is its "other side."[20]
>
> The mind gives the body an order, and is obeyed at once: the mind gives itself an order and is resisted . . . The mind I say commands itself to will: it would not give the command unless it willed: yet it does not do what it commands. The trouble is that it does not totally will: therefore it does not totally command.[21]

We would not recognize these men as great saints and scholars unless we recognized as true for ourselves their descriptions of thoughts, feelings, and convictions welling unbidden from our inner selves.

No policy requires a conclusive presumption that conscience is compellable, in the face of the general experience that it is not.

3. The time-honored national policy expressed in section 6(j) which exempts conscientious objectors requires that any regulation concerning conscientious objection be consistent with and authorized by that section.

This Court has long recognized the strong Congressional policy protecting registrants who claim conscientious objector status.[22] That policy has avoided and should continue to avoid forcing sincere applicants to choose between going to prison or violating their religious principles.

---

[20]C. G. Jung, "Approaching the Unconscious," in *Man and His Symbols*, ed. C. G. Jung (Dell, 1969) 22.

[21]Augustine, *op. cit. supra*, n. 17, at 141.

[22]*United States v. Seeger*, 380 U.S. 163 (1965), where the Court exhaustively reviewed the history and purpose of section 6(j).

In *United States v. Seeger,* this Court, in construing the statutory language of section 6(j) broadly, stated that:

> This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[23]

And the Court went on to state that

> We have construed the statutory definition broadly and it follows that any exception to it must be interpreted narrowly. The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being.[24]

The Regulation now before the Court sets out the procedures to be followed whenever a request for a new and different classification, of any kind, is made after mailing of an induction order. Local boards and courts, finding no specific regulation with respect to post-induction-order conscientious objector claims, have applied this regulation to such claims as well as to those claims where observable physical facts are present as in hardship, physical fitness,[25] and sole

---

[23]380 U.S. 163, 176 (1965).

[24]*Id.* at 186.

[25]50 U.S.C. App. § 456(h) authorizes the President to issue regulations providing for each of these deferments. See 32 C.F.R. § 1622.17, § 1622.44.

surviving son.[26] The construction placed on the Regulation by the Court below is in conflict with and unauthorized by the statute.[27]

---

[26]50 U.S.C. App. § 456(o). See 32 C.F.R. § 1622.40.

[27]It can be persuasively argued as well that the Regulation is not only incorrectly construed, but is also invalid when applied to conscientious objections whenever they mature. 50 U.S.C. App. § 460 cannot constitutionally be regarded as conferring an unlimited rule-making power, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and regulations purporting to change, rather than implement, the statute are impermissibly in conflict therewith. *Trust Under the Will of Bingham v. Commissioner*, 325 U.S. 365 (1944); *Miller v. United States*, 294 U.S. 435 (1935). A regulation may not destroy rights which the legislature has conferred. *United States v. George*, 228 U.S. 14 (1912). The Regulation suffers from four such infirmities: (1) Since "nothing" shall require a conscientious objector to enter combatant service, it changes and destroys rights conferred in section 6(j) of the Act. (2) Since it distinguishes among conscientious objectors based solely on the irrelevant fact of when an induction order is mailed, *a fortiori* it is not "fair and just," thereby changing and destroying rights conferred in section 1(c) of the Act. (3) Since it permits local boards to make the *unappealable* determination of whether there has been a "change in status due to circumstances over which the registrant had no control," it changes and destroys the protective rights conferred in section 10(f)(3) of the Act that local boards are empowered only to "hear and determine, subject to the right of appeal . . ."

> The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purpose of the act—not to amend it. [citation omitted] *Miller v. United States*, 294 U.S. 435. 440 (1935)

And (4) Since it instructs a local board to make a specific finding on the occurrence of "circumstances," which, as shown in I.A.2 *supra* can include a religious conversion experience, it empowers the board to question the validity of a registrant's belief that such a religious experience has occurred to him, an inquiry which is foreclosed to the Government. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

Section 6(j) of the Act does not contain a pre-notice-of-induction time limitation on the right to claim conscientious objector status, and the construction of the Regulation as adopted below is contrary to the intent of Congress and the clear language by which its intent was expressed.[28]

The *Gutknecht* case involved the delinquency regulations (32 C.F.R. Part 1642), which the Government attempted to justify as reasonable under section 10 of the Act. This Court rejected that argument, holding that since the delinquency regulations affected specific provisions of the Act (i.e., selection, section 5; and deferments and exemptions, section 6), the authorization for those regulations must be found in the specific sections to which they relate, and if no such authorization can be found, the regulations are unauthorized by statute and invalid.

The absence of a provision in the statute creating a duty assertedly established by a regulation necessitates a finding that there is no such duty. *Toussie v. United States.*[29]

In *Oestereich,* where this Court was asked to deprive a registrant of a statutory ministerial student's exemption by use of the delinquency regulations, this Court stated:

> There is no suggestion in the legislative history that, when Congress has granted an exemption

---

[28] *United States v. Gutknecht,* 396 U.S. 295 (1970); *Breen v. Selective Service Board,* 396 U.S. 468 (1970); *Toussie v. United States,* ..... U.S. ....., 38 U.S.L.Week 4181 (1970); *Oestereich v. Selective Service Local Board* #1, 393 U.S. 233 (1968).

[29] ..... U.S. ....., 38 U.S.L.Week 4181 (1970).

> and a registrant meets its terms and conditions, a board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption.[30]

In this case, the specific section of the Act granting the exemption for conscientious objection is explicit:

> *Nothing* contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. (Emphasis supplied.)[31]

In light of the lessons of *Gutknecht, Breen, Toussie* and *Oestereich,* when, as here, the authorization for the construction of a regulation is not found in the specific section to which it relates, both the Regulation and the construction placed on it are invalid when it is applied to a claim for conscientious objector status.

The absence of a provision in the statute creating a pre-notice-of-induction time limit on the right to claim the exemption compels the conclusion that there is no such time limit. *Toussie v. United States.*[32] As Judge Ganey said in *United States v. Underwood:*

> It is plain that a person meeting the conditions of the above section of the Act [6(j), Military Selective Service Act of 1967] is not to be subjected to combatant training and service. This

---

[30] 393 U.S. 233, 237 (1968).

[31] 50 U.S.C. App. § 456(j).

[32] ___ U.S. ....., 38 U.S.L. Week 4181 (1970).

> privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms.[33]

In *Quaid v. United States*,[34] a reservist who had failed to participate satisfactorily in reserve meetings was certified and ordered for priority induction by his local board under otherwise appropriate standards,[35] even though he had previously filed a conscientious objector claim with his board. The local board relied on 32 C.F.R. § 1631.8, which provides that in the case of a delinquent reservist the board "shall order" him for induction "without changing his classification," and refused to consider his claim. The Court held that the language of section 6(j) was absolute and it followed therefrom that the local board was required to consider and dispose of his claim before sending him an induction notice. The Court further noted that section 6(c)(2)(D) of the Act states that delinquent reservists "*may* be selected for training and service . . . prior to the selection and induction of other persons liable therefor" (emphasis supplied), and held that Congress had used the permissive language "may be selected" because

> it knew there might be cases in which priority induction would be inappropriate because it

[33] 151 F.Supp. 874, 876 (E.D.Pa. 1955).
[34] 386 F.2d 25 (10th Cir. 1967).
[35] 50 U.S.C. App. § 456(c)(2)(O); 32 C.F.R. § 1631.8.

would violate the emphatic, imperative provision of section 456(j) that a conscientious objector shall not be required to serve in the armed forces.[36]

It is, as Judge Merrill stated in his dissenting opinion below, "beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law."[37]

4. Under the majority holding below, a registrant who acquires beliefs against war after his order to report for induction is mailed but before his reporting date is forever precluded from asserting his claim.

A claim of conscientious objection advanced prior to the mailing of an induction order must be considered by the local board and the classification reopened if a prima facie showing is made.[38] The local board

---

[36]386 F.2d 25, 29. This reasoning concerning conflict with the clear mandate of section 6(j) was adopted verbatim by the Ninth Circuit in *Olson v. United States*, ... F.2d ....., 2 Sel. Serv.L.Rep. 3637 (9th Cir. 1970), and is equally persuasive here. *Lurie v. United States*, 402 F.2d 297 (5th Cir. 1968); and *Schmitt v. United States*, 413 F.2d 219 (5th Cir. 1969), *cert. denied* ..... U.S. ....., 24 L.Ed.2d 423 (1969).

[37]*Ehlert v. United States*, 422 F.2d 332, 339 (A. 46). See also *United States v. Gearey*, 368 F.2d 144, 144-50 (2d Cir. 1966); Note, *Pre-induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 Yale L.J. 1459 (1963); Note, *Ninth Circuit Review: Selective Service*, 21 Hastings L.J. 1038, 1043 (1970).

[38]*Mulloy v. United States*, ... U.S. ....., No. 665, October Term, 1969, June 15, 1970; 38 U.S.L.Week 4509 (1970); *Stain v. United States*, 235 F.2d 339 (9th Cir. 1956); *United States v. Freeman*, 388 F.2d 246 (7th Cir. 1967); *Olvera v. United States*, 223 F.2d 880 (5th Cir. 1955); *United States v. Vincelli*, 216 F.2d 681 (2d Cir. 1954).

cannot deny the claim unless its action is supported by a basis in fact.[39]

On the other hand, if the claim is first advanced after induction, it must be considered by the military under the applicable regulations adopted by each branch of the armed forces allowing for applications for discharge on the basis of conscientious objection which has arisen subsequent to entry into the service. Department of Defense Directive 1300.6 issued May 10, 1968, provides, in pertinent part:

> [R]equest for discharge after entering military service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained.

However, due to the combined effect of this directive with the rule adopted by the Ninth Circuit, a registrant whose views against participation in war mature after his induction order has been mailed but before his induction date can never present his claim to either Selective Service or military authorities. The creation of a "no man's land" for conscience which asserts itself after an induction order but before induction is not required by the language of the Regulation. The unambiguous language of section 6(j) of the Act does not permit a reading of the

---

[39] *Dickinson v. United States*, 346 U.S. 389 (1953); *Witmer v. United States*, 348 U.S. 375 (1955).

Regulation which creates a "no man's land" for claims of conscience which mature unseasonably.[40]

Congress did not intend to create a class of conscientious objectors who, because their conscience spoke unpropitiously, are excluded from section 6(j)'s exemption. Indeed, any congressional enactment making such a distinction would raise serious constitutional questions. Assuming that the exemption for conscientious objectors is in fact a matter of legislative grace not compelled by the First Amendment's free exercise of religion guarantee, still government may not arbitrarily and unreasonably grant the exemption privilege to some and deny it to others.[41]

A law affecting fundamental religious liberties cannot, in the absence of some compelling state interest, draw distinctions between religious beliefs.[42] Such distinctions, usually condemned as a violation of the guarantee of equal protection of the laws, also violate the guarantee of due process of law contained in the Fifth Amendment.[43]

A governmental policy extending exemption to claims of conscience maturing prior to an induction order and after submission to induction, but denying exemption to claims of conscience arising between those times, would be an unjustifiable and invidious

---

[40] *Ehlert v. United States*, 422 F.2d 332, 338 (dissent) (A. 44).

[41] U.S. Const. amend. I; *Sherbert v. Verner*, 374 U.S. 398 (1963).

[42] *Sherbert v. Verner*, 374 U.S. 398, 403, 406. And see *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[43] U.S. Const. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954).

discrimination. The language of section 6(j), however, does not even remotely suggest such a policy, and the Regulation should not be construed in a manner which produces such a questionable result.

5. Judge Duniway's concurring opinion in the case below misconceives the nature of the term "circumstance" in 32 C.F.R. § 1625.2.

Judge Duniway, concurring below, asserted that the mental and spiritual processes which impel a registrant to adopt certain religious beliefs are not "circumstances," and therefore do not fall within the language of the Regulation.[44]

If a registrant's father is suddenly killed in a plane crash, leaving the registrant as the sole support of his entire family, the local board would be required to reopen and reclassify the registrant. The change in status, i.e., the change in the family's financial dependency, qualifies the registrant for deferment under the Selective Service regulations.[45] This change, resulting from a plane crash, is clearly an external event beyond the registrant's control meriting reopening. However, in Judge Duniway's view, if a registrant should have a sudden change in his state of mind, such that had this change occurred prior to receipt of his induction order he would have clearly qualified for conscientious objector status, whether this change were due either to some external event, such as the receipt of an induction order, or to some

---

[44] *Ehlert v. United States*, 422 F.2d 332, 335 (A. 35).

[45] 32 C.F.R. § 1622.30(b). A similar situation occurred in *Petrie v. United States*, 407 F.2d 267 (9th Cir. *en banc* 1969).

internal event such as a religious conversion or an emergence to consciousness of unconscious thoughts, this registrant would not be entitled to reopening or reclassification.

Judge Merrill exposed the fallacy of the Duniway position when he stated that:

> A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings.[46]

Clearly Congress and Selective Service did not intend such a discriminatory result.

6. The record in this case clearly presents both the substantive and procedural issues which underlie a correct interpretation of the Regulation.

In contrast to the facts of the case at hand, the petitioner in the *Gearey* case, after having filed his application for conscientious objector status after receipt of an order to report for induction, was invited by his local board to appear for an interview. Upon conclusion of that interview the board informed Gearey that it believed he was not a "genuine C.O."

---

[46] *Ehlert v. United States*, 422 F.2d 332, 338 (dissent) (A. 44).

and that the facts he presented did not warrant a change in his classification.[47]

Here, no interview was granted. The local board, in a personal letter to petitioner, advised him that it had not reopened his classification because his claim to conscientious objector status "was not a change in your status which was beyond your control." (A. 61).

The board never reached the question of the genuineness of Ehlert's claim and made no finding as to when his claim in fact matured. The District Court, however, reviewed the complete record in Ehlert's case and at trial, after hearing and argument, stated "if this were a case in Judge Kaufman's Circuit . . . [the 2d Circuit] . . . I would feel, based on the record before me, I would have to acquit the accused" (A. 22). This statement puts to rest the problem expressed in Judge Ely's concurring opinion that the District Court may not have decided the issues here presented.[48]

Thus, as noted in the Petition for Certiorari, eleven of the thirteen judges of the Court below perceived that this case squarely presented the question of the proper interpretation of the Regulation at issue. The substantive issue of the genuineness of Ehlert's belief had previously been determined by the District Court.

---

[47] *United States v. Gearey*, 379 F.2d 915, 917 (2d Cir. 1966).
[48] *Ehlert v. United States*, 422 F.2d 332, 335 (A. 36).

II. THE RESULT URGED BY PETITIONER PLACES NO SIGNIFICANT BURDEN ON SELECTIVE SERVICE, AND CANNOT CONCEIVABLY DISRUPT THE MANPOWER REQUIREMENTS OF THE MILITARY.

Each month, upon the advice of the Secretary of Defense, the National Director of Selective Service issues to each State Director a call for a specified number of inductees.[49] Each State Director then issues to each local board within his state a call for a specified number of men, based upon their pool of registrants classified I-A acceptable.[50] The local board then determines which registrants are to be called, from the order of call provisions,[51] and issues to those registrants an order to report for induction.[52]

When a registrant who has been issued an order to report is able to postpone or cancel his induction, there will then be less registrants reporting than the local board has ordered. The provisions of 32 C.F.R. § 1631.7(b) then govern:

> Whenever the number of postponements of induction materially reduces the number of men the local board actually can deliver in response to a call, the local board shall issue orders to report for induction to such numbers of additional men as may be necessary to meet the call, taking into account the number of men to be delivered following the expiration of postponements previously granted.

---

[49] 32 C.F.R. § 1631.4.
[50] 32 C.F.R. § 1631.5.
[51] 32 C.F.R. § 1631.7(a).
[52] 32 C.F.R. § 1632.1.

If this Court reverses the decision below, this machinery is adequate to assume the negligible burden of brief delays in induction of the presumably small number of registrants who would then qualify for a reopening. If the registrant were to achieve a reopening, the local board simply issues additional induction orders pursuant to Regulation 1631.7(b). This is easily handled and often done. Some State Selective Service Headquarters have established routine procedures for handling conscientious objection claims in the manner urged by petitioner.[53] This minimal burden does not justify the discrimination inherent in denying the opportunity for reopenings to recently

---

[53] "I. *Processing Conscientious Objector Claimants*

* * * * *

"Whenever a registrant files his initial claim as a conscientious objector, the local board is requested to reopen his case under the provisions of SSR 1625.3(a) in order to give the registrant the right of personal appearance and appeal. The registrant's case should be reopened even though he filed his initial claim after he is under an order to report for induction."

State Headquarters, Selective Service System, Raleigh, North Carolina, Circular Letter No. 111-4-a;

"Registrants Claiming Conscientious Objector Status

* * * * *

"If a registrant for the first time claims conscientious objector status . . . *after* an induction order has been mailed, the SSS Form 150 shall be issued to the registrant. . . . If the form is returned prior to the induction date and there will be no regularly scheduled meeting of the local board before the induction date, the registrant's induction shall be postponed. . . . The local board must then specifically determine if there has been a change in status resulting from circumstances over which the registrant had no control. . . . Should the local board determine that there has been a change in status beyond the registrant's control, the registrant may then be reclassified . . ."

State Headquarters, Selective Service System, Sacramento, California, Operation Memorandum (Class.) May 21, 1970 (emphasis in original).

crystallized claims of conscience when reopenings, reclassifications, and postponements are granted in many other situations, including but not limited to the following: when the registrant is a full-time university student,[54] when the registrant is preparing to take an upcoming Bar Examination,[55] where the registrant transfers his induction to his place of residence,[56] where the registrant is removed from delinquency status,[57] where the registrant is found physically unacceptable or unqualified at the induction center,[58] when the registrant enlists in the Army Reserves or National Guard,[59] and when an alien registrant leaves the country.[60] Likewise, other events may make him eligible for deferments such as extreme hardship, medical unfitness, as an irreplaceable employee in an occupation in the national interest,[61] or as a sole surviving son.[62] Petitioner urges that this Court should not allow a construction of the Regulation which requires different treatment for similar situations.

---

[54]32 C.F.R. § 1622.15(b); *Marsano v. Laird*, 412 F.2d 65 (2d Cir. 1969); State Director Advice No. 763, as amended October 2, 1969, 2 Sel.Serv.L.Rep. 29.

[55]Local Board Memorandum No. 44, as amended December 29, 1961, 1 Sel.Serv.L.Rep. 2175.

[56]32 C.F.R. § 1632.9.

[57]32 C.F.R. § 1642.4.

[58]32 C.F.R. § 1622.17; Army Reg. 601-270, pars. 3-18(b)-(4), 4-20(2) and 4-21, 1 Sel.Serv.L.Rep. 2224, 2265-66.

[59]See 32 C.F.R. § 1622.13(f)(2) and (3).

[60]See 32 C.F.R. § 1622.42(c).

[61]32 C.F.R. §§ 1622.22 and 1622.23.

[62]32 C.F.R. § 1622.40(a)(10).

The majority opinion below fundamentally misunderstands the *Gearey* rule and petitioner's position.

The majority below justified this discrimination against conscientious objector claimants on the grounds that:

> A Board can readily ascertain the validity of an "extreme hardship," "sole surviving son," and other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.[63]

Using the *Gearey* standard, the initial determination by the Board is only if a prima facie showing has been made by the registrant's claim, that his professed beliefs have matured after the induction order was mailed and that this resulted from circumstances beyond his control. The local board makes this determination by a fair reading of the registrant's own statements. The law does not require any kind of detailed inquiry into his sincerity and past history. If the registrant fails to make the required

---

[63] *Ehlert v. United States*, 422 F.2d 332, 334 (9th Cir. 1970) (A. 34).

prima facie showing, the board cannot reopen and must leave the induction order in effect.[64]

Even when a registrant succeeds in meeting the reopening standard contained in the Regulation, he is entitled only to a short personal appearance before the local board,[65] and an appeal to the State Appeals Board at which a determination is made strictly from the file, with no new evidence taken and no appearance by the registrant.[66] Such matters, should Selective Service choose, could be given top priority and decided in a matter of weeks.

This is exactly the same kind of determination a board must make in deciding whether to reopen for consideration any other type of claim presented after an induction order has been issued. All cases require only an initial finding by the board as to whether the registrant meets the post-induction-order reopening standard of change of status resulting from circumstances beyond a registrant's control.

Even the processing of fraudulent conscientious objector claims does no more than delay inevitable

---

[64]It should be emphasized that petitioner is not asking that there be, ipso facto, a reopening and rehearing on all post-induction-order conscientious objector claims; he is merely urging that the Regulation not be construed in such a manner as to inevitably foreclose the application of the very standards set forth in the Regulation. Petitioner would welcome the former holding, which would necessitate the complete invalidation of the Regulation, a holding which petitioner believes is warranted. See n. 27, *supra*.

[65]32 C.F.R. § 1624.1.

[66]32 C.F.R. Part 1626.

induction, and the attraction of successive delays by obstructionists has now been effectively foreclosed.[67] Congress in the 1967 Act abolished the complicated and time-consuming Department of Justice hearing procedures, which could often be used to delay induction by as much as two years.[68] It is also now impossible for a registrant to avoid induction by stalling past his twenty-sixth birthday.[69] The Act imposes criminal sanctions on anyone who makes any false statement with respect to his Selective Service classification.[70] This sanction, rather than cutting off all late-maturing claims for conscientious objector status upon the fear that some may be made in bad faith, is the appropriate method for the Government to use to discourage the making of false claims.

Selective Service has the additional authority to adjust its manpower calls at the state and national levels for the few cases where inductions might be postponed or cancelled in order to consider late-maturing conscientious objector claims which do meet the reopening standard. Such procedures are already

---

[67]Given the heavy burden which a post-induction-order claimant must meet to get consideration of his claim and to prove his sincerity to the board, there is little reason why even registrants who merely wish to delay induction should wait until *after* an induction order has been mailed to file a bad faith claim. Under the new lottery system order of call, registrants are aware of the approximate month in which they will be called and can time any delay-seeking claim until just before their lottery number is reached. See note, 72 Yale L.J. at 1467.

[68]The 1967 Selective Service Amendments, P.L. 90-40, 81 Stat. 100 amended 50 U.S.C. App. § 456(j) to omit the Department of Justice hearing. See *United States v. Haughton*, 413 F.2d 736, 738 (9th Cir. 1969).

[69]32 C.F.R. § 1631.7(a).

[70]50 U.S.C. App. § 462(a).

used to provide for the large number of postponements due to student status and medical unfitness. This is illustrated by the fact that over 15% (54,524) of the registrants ordered to induction in 1968 were rejected at the induction center on physical grounds. Selective Service has accommodated to this reality by developing the practice of ordering an excessive number of registrants for induction.[71] There is absolutely no reason to think that a system which is used to a 15% physical drop-out rate cannot absorb the relatively small number of conscientious objectors which adoption of petitioner's position would create.

These safeguards—(1) the relatively few registrants who will file post-induction-order claims for conscientious objector status, (2) the power of the Government to discourage false claims through criminal sanctions, (3) the power of the local board to refuse to reopen a classification if the claim on its face shows it matured before the induction order was issued, (4) the expedient nature of the System's review of conscientious objector claims, (5) the power and demonstrated ability of the local board to compensate for postponements under Regulation 1631.7 (b), and (6) the power of the State and National Directors of Selective Service to adjust manpower calls to provide for the few cases where inductions will be delayed—make it certain that the administrative burden will be negligible if this Court reverses the decision below. It does mean that the System will

[71]Medical Statistics Agency, Supplement to *Health of the Army: Results of the Examination of Youth for Military Service, 1968* (Department of the Army, 1969).

have to make small accommodations to insure protection of all registrants who develop religious beliefs against participation in war, no matter when those beliefs crystallize. These small accommodations cannot outweigh the strong national policy and Congressionally-mandated exemption regarding conscientious objectors. As Justice Frankfurter so eloquently stated in a Selective Service case decided during the Korean War (dissenting):

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness which have heretofore prevailed in this country, to be overborne by military exigencies.[72]

CONCLUSION

For the reasons stated herein, petitioner urges that this Court reverse the decision below and hold that the Regulation cannot validly preclude or be construed to preclude a local board from considering a registrant's claim of conscientious objection which

---

[72] *United States v. Nugent*, 346 U.S. 1, 12-13 (1953), Frankfurter, J., dissenting. The issue in *Nugent* was whether a conscientious objector claimant had a right to a complete copy of the F.B.I. report carried out under the Department of Justice's pre-1967 hearing procedures.

crystallizes after the board has ordered the registrant to report for induction.

Dated: July 21, 1970.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN & LIPPETT,
By STANLEY J. FRIEDMAN,
Attorneys for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Summary of argument	10
Argument:	
I. A claim to conscientious objector status is not entitled to Selective Service Board consideration if made after the mailing of an induction notice	13
A. The manifest purpose of the regulation was to set an absolute time limit on claims not based on emergent external events	17
B. This limitation on post-notice claims is authorized by statute and does not conflict with Section 6(j) of the Act	27
II. Even assuming post-notice claims of conscientious objection are entitled to board consideration, the refusal to reopen was warranted in the present case	33
Conclusion	39

CITATIONS

Cases:

Badger v. *United States*, 322 F. 2d 902	20
Blades v. *United States*, 407 F. 2d 1397	22
Boyd v. *United States*, 269 F. 2d 607	15, 31
Capobianco v. *Laird*, 424 F. 2d 1304, petition for certiorari pending, No. 611, this Term	15, 20, 34
Clark v. *United States*, 236 F. 2d 13	30, 32
Davis v. *United States*, 374 F. 2d 1	16, 31
Dickinson v. *United States*, 346 U.S. 389	30, 34, 35
Dugdale v. *United States*, 389 F. 2d 482	16
Estep v. *United States*, 327 U.S. 114	29, 30, 34, 35
Falbo v. *United States*, 320 U.S. 549	29
Feuer v. *United States*, 208 F. 2d 719	15

406-547—70——1

Cases—Continued

	Page
Gillette v. *United States*, No. 85, this Term	38
Keene v. *United States*, 266 F. 2d 378	14, 15, 29, 30, 31, 32, 35
Kramer v. *United States*, 147 F. 2d 756	29
Leitner v. *United States*, 222 F. 2d 363	15
Louisville Gas Co. v. *Coleman*, 277 U.S. 32	33
Martinez v. *United States*, 384 F. 2d 50	16, 22
Mulloy v. *United States*, 398 U.S. 410	20, 30, 34
Negre v. *Larson*, No. 325, this Term	38
Palmer v. *United States*, 401 F. 2d 226	22
Parrott v. *United States*, 370 F. 2d 388, certiorari denied sub nom. *Lawrence* v. *United States*, 387 U.S. 908	15, 27
Paszel v. *Laird* 426 F. 2d 1169	14, 15, 18, 20, 29, 34
Petrie v. *United States*, 407 F. 2d 267	15, 20
Porter v. *United States*, 334 F. 2d 792	15
Scott v. *Volatile*, C.A. 3, No. 18, 546, decided September 15, 1970	16, 18, 20, 24, 34
Straight v. *United States*, 413 F. 2d 263	22
United States v. *Al-Majied Muhammad*, 364 F. 2d 223	16
United States v. *Bartelt*, 200 F. 2d 385	15
United States v. *Beaver*, 309 F. 2d 273, certiorari denied, 371 U.S. 951	14, 19, 24, 31
United States ex rel. Berman v. *Craig*, 207 F. 2d 288	15
United States v. *Blaisdell*, 294 F. Supp. 1303	16
United States v. *Bowen*, 421 F. 2d 193	34
United States v. *Brown*, 129 F. Supp. 237	16
United States v. *Broyles*, 423 F. 2d 1299	39
United States v. *Delfin*, 419 F. 2d 226	14, 15, 29
United States v. *Gearey*, 368 F. 2d 144	14, 15, 16, 17, 21, 22, 23, 24, 29, 30, 31, 33, 35, 38, 39
United States v. *Gearey*, 379 F. 2d 915, certiorari denied, 389 U.S. 959	34, 38, 39
United States v. *Helm*, *386 F. 2d 434*, certiorari denied, 390 U.S. 958	16
United States v. *Hinch*, 292 F. Supp. 696	16
United States v. *Holmes*, 426 F. 2d 915	22
United States v. *Jennison*, 402 F. 2d 51	16, 21
United States v. *Kanner*, 416 F. 2d 522	31
United States v. *Kroll*, 400 F. 2d 923	16, 32
United States v. *Maine*, 417 F. 2d 951	16

Cases—Continued Page
United States v. *Mohammed*, 288 F. 2d 236, certiorari denied, 368 U.S. 820 ..... 15, 32, 34
United States v. *Nugent*, 346 U.S. 1 29
United States v. *Sandbank*, 403 F. 2d 38, certiorari denied, 394 U.S. 961 15
United States v. *Schoebel*, 201 F. 2d 31 ..... 15, 21, 31
United States v. *Seeger*, 380 U.S. 163 ..... 20, 21, 23, 30
United States v. *Stafford*, 389 F. 2d 215 ..... 15, 22
United States v. *Stoppelman*, 406 F. 2d 127, certiorari denied, 395 U.S. 981 ..... 16, 22
United States v. *Taylor*, 351 F. 2d 228 ..... 15, 31, 32
Warren v. *United States*, 177 F. 2d 596, certiorari denied, 338 U.S. 947 ..... 24, 32
Welsh v. *United States*, 398 U.S. 339 ..... 23, 30, 37
Witmer v. *United States*, 348 U.S. 375 ..... 30, 35
Statute and regulations:
Military Selective Service Act of 1967 (formerly the Universal Military Training and Service Act), 65 Stat. 75, as amended, 81 Stat. 100:
50 U.S.C. App. 456(j) 2, 12, 17, 25, 27, 30, 31, 38
50 U.S.C. App. (Supp. V) 460(b) 28, 34
50 U.S.C. App. 462(a) 17
Air Force Regulation AFR 35–24 (March 25, 1969) .. 26
Army Regulation AR 635–20 (Jan. 1, 1970) 26
Coast Guard COMDTINST 1900.2 (Oct. 7, 1968) .. 26
Department of Defense Directive No. 1300.6:
Aug. 21, 1962 ..... 4, 25
May 10, 1968 ..... 25, 26
Marine Corps Order MCO 1306.16B (June 18, 1969) .. 26
Navy Department, BURPERINST 1900–5 (July 18, 1968) 26
Selective Service Regulations:
32 C.F.R. 626.2 28
32 C.F.R. 1623.1(b) 22
32 C.F.R. Part 1625 8
32 C.F.R. 1625.2 ..... 3, 10, 12, 13, 16, 18, 22, 28, 32, 34
32 C.F.R. 1625.4 34
32 C.F.R. 1625.13 8
32 C.F.R. 1626 28
32 C.F.R. 1627 28

Miscellaneous: Page

Adcock, *Fundamentals of Psychology* (Penguin Books, 1968)---------- 19

Executive Order No. 10594---------- 28

Freud, *The Ego and the Id* (Norton, 1962 ed.)---------- 19

James, *Psychology* (Briefer Course, Collier Books, 1969 ed.)---------- 19

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *en banc* opinion of the court of appeals (A. 31–47) is reported at 422 F. 2d 332. The original opinion of the panel of the court of appeals (A. 25–27) is not reported. The district court did not render a written opinion.

JURISDICTION

The judgment of the court of appeals (A. 48) was entered on February 2, 1970. On March 16, 1970, Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to and including April 3, 1970. The petition was filed on April 2, 1970,

and was granted on May 4, 1970 (397 U.S. 1074). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the alleged maturation or crystallization of conscientious objector beliefs after the mailing of a notice to report for induction is, within the intended meaning of 32 C.F.R. 1625.2, a circumstance over which the registrant had no control, permitting his draft classification to be reopened at that late date.

2. Whether in any event there was a "basis in fact" for the local board's refusal to reopen and reclassify petitioner as a conscientious objector.

STATUTE AND REGULATIONS INVOLVED

50 U.S.C. App. 456(j), as in effect at the time this action was commenced, provided in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if

he is inducted into the armed forces under this title * * *, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) * * * such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title * * *, to have knowingly failed or neglected to perform a duty required of him under this title * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * *

32 C.F.R. 1625.2 provides:

The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the regis-

trant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control.

Department of Defense Directive No. 1300.6 (August 21, 1962) provided:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.

STATEMENT

After trial without a jury in the United States District Court for the Northern District of California,

petitioner was convicted of having refused to submit to induction into the armed forces, and was sentenced to two years' imprisonment. His conviction was reversed by a panel decision of the Court of Appeals for the Ninth Circuit, one judge dissenting. On rehearing *en banc,* however, the conviction was affirmed by an eight-to-five decision.

A. Petitioner first registered with his local board on July 24, 1961, after reaching his eighteenth birthday (F. 1).[1] He made no claim to conscientious objector status in his classification questionnaire (F. 7), which he returned to the board on January 17, 1964 (F. 8). On April 15, 1964, he was sent an order to report on May 26 for his physical examination (F. 13); in response he requested only that the examination be processed through a local board more convenient to his new residence (F. 14).

Petitioner's induction notice was mailed to him June 16, 1965, effective July 14 (A. 50). On July 13, he mailed a letter to his board stating that he could not accept induction and wished to apply for conscientious objector status. He acknowledged that he could no longer make such application as a matter of right but invoked the discretion which he understood local boards possess to reopen classifications. In his letter, petitioner explained that he had been "unable

[1] "A." refers to the printed appendix in this Court; "R." to the trial transcript, which was part of the record in the court of appeals; "F." to petitioner's selective service file, which was part of the record in both the district court and the court of appeals. Both of the latter are part of the record in this Court.

to make a decision of such moment until faced with the absolute necessity to do so" and that, since receiving his induction notice, he had "begun to be more fully aware of the implications of military service at this time." The asserted nature of his objection was, in essence, "that the sole purpose of military service in this country today is preparation for a nuclear orgasm which would be totally destructive of human life and values" (A. 51).

On July 14, petitioner reported to the bus depot from which inductees left for the induction center but refused to go to the center. He was then told to report to the office of his local board. There, he stated that "he was in the process of being a Conscientious Objector" and that he had mailed a letter "a couple days ago" explaining his position. He was given an SSS Form 150 to complete and return and was told that he would hear from the board after his file was reviewed upon receipt of his letter and the completed Form 150 (A. 52).

On his Form 150, petitioner struck out the paragraph addressed to a claim of exemption only from combatant training and service and also the paragraph claiming exemption from both combatant and noncombatant training and service (A. 54). He indicated that he did not believe in a Supreme Being and that he had no convictions which could be called religious in the commonly understood sense of the word (A. 55). Instead, he stated that his claim was based on a belief that "service in the armed forces of this

country at this time is work toward the end of the destruction of the human race" and that his "duty not to work for the destruction of the human race is superior to any duties which may arise from any human relation" (A. 54). He allegedly did believe, however, in the use of force "[u]nder any circumstances in which the use of force would not make more probable the destruction of the human race." As to the time period during which he acquired these beliefs, petitioner stated it was "from September, 1960, to the present"; also, he added, the "source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." Never had he given any written or oral public expression to his beliefs (A. 55).[2]

B. Following petitioner's refusal to submit to induction, his Selective Service file was forwarded to the United States Attorney for prosecution (F. 11, 29, 30). Prosecution was declined on January 5, 1966, in order to enable the local board to review the information submitted by petitioner and afford him another opportunity to submit to induction (F. 34). The state

[2] He also acknowledged that he had participated in R.O.T.C. while he was a student at the University of California, but said that at the time participation was compulsory for lower division male undergraduates (A. 56). At trial, he testified that he knew when he enrolled at the university that he would be required to take R.O.T.C. He added that, except for being annoyed at being forced to take a required course, he had no objection to his participation, since at the time he had "no notion of the ideas which led me to ask for a conscientious objector's status" (R. 26–27).

director instructed the board to consider petitioner's Form 150 and, if it determined not to reopen, to give petitioner another opportunity to report for induction under the previously issued order (A. 58). On January 19, 1966, petitioner was informed that the board had found on review that the facts presented did not warrant a reopening or reclassification (A. 59).[3] He then (January 21) requested a personal appearance before the local board to discuss his application further (A. 60). This request crossed in the mail with a notification sent by the board on January 22 ordering petitioner to report for induction on February 9, 1966, pursuant to the prior induction order (F. 38).

In answer to his January 21 request, the board sent petitioner a letter on January 28 which reviewed the history of his case and then stated that the board had determined, after reconsidering his classification under the provisions of Part 1625 of the Selective Service regulations, that the information submitted on his Form 150 was not indicative of a change in status beyond his control warranting reopening of his classification. Thus, he was told, that under the regulations he was not now entitled to a personal appearance.[4] On February 5, petitioner wrote to the board

[3] An entry was made in the minutes of the local board on January 18, 1966, that petitioner's file had been reviewed and not reopened (F. 11).

[4] The letter explained that a personal appearance is a procedural right to which a registrant is entitled only when a change of classification is made by the local board and the registrant makes a request for such an appearance within ten days after the classification card is mailed (A. 61). See 32 C.F.R. 1625.13.

objecting to the action taken; he requested that the letter be sent to the appropriate appeal board for consideration (F. 40).

On February 9, petitioner appeared before an induction officer but refused to take a new physical examination to determine if he was still physically qualified for induction (F. 42). The same day he signed a statement saying that he refused to be inducted (F. 43).[5]

C. Immediately after refusing to take his physical examination, petitioner was interviewed by an F.B.I. agent. He told the agent that he was refusing induction because he believed that participation in the military would be the same as participation in the destruction of the nation and the world, since he felt that a nuclear war was building. He added that the object of a human being on earth is to perpetuate the race and the country; and, because he viewed war as suicidal, he felt that participation in it would be a contribution to the suicide of the country. He fur-

[5] The next day, the state director requested the local board to forward the file for review (F. 41). Thereafter, on March 2, 1966, the state director wrote to petitioner that examination of his file indicated that his procedural rights had been observed in all respects and hence that no intervention on the state level was contemplated. The letter noted that petitioner had neither claimed conscientious objector status on his classification questionnaire nor appealed his initial 1-A classification but instead had submitted his first claim for the exemption on the day when he was to have reported for induction. The letter also noted that the local board had reviewed his claim when it was submitted and determined not to reopen his file, and had also considered his request for a personal appearance and had explained to him by letter its reasons for denying it (A. 62).

ther informed the agent that his beliefs in this respect were derived solely from reading, studying and talking to other persons (R. 19). Petitioner also said that a contributing factor in his refusal was the fact that the local board had ordered him to report for induction immediately after denying him the appeal which he had requested, since he felt that he should have been entitled to a ten-day period in which to appeal this denial (R. 20).

At trial, petitioner gave a further explanation of the mental process which led to his claim to conscientious objector status. He said that when he entered college in 1960 he came into contact for the first time with pacifist groups who were against the war and the idea of maintaining a nuclear arsenal (R. 24). These groups, he said, engaged in activities and demonstrations designed to show the public that a large number of people "had grave doubts about the validity of the idea of maintaining a strong nuclear arsenal as a necessity of continuing freedom and liberty" (R. 25). He maintained, however, that it was not until he received his first induction notice that he "finally realized" he had "no other choice" but to refuse induction. As he explained it: he "had doubts previously but the induction notice simply forced me to face the issue and I realized the thing about what I was going to do, that I couldn't go in" (R. 28).

SUMMARY OF ARGUMENT

1. This case calls into question the validity of Selective Service regulation 32 C.F.R. 1625.2 insofar

as it has been interpreted to foreclose local boards from entertaining conscientious objector claims raised for the first time after the mailing of a notice to report for induction. At issue is whether such a claim, purportedly based on a sudden late crystallization of inchoate beliefs, can, within the intended meaning of the regulation, constitute a "change in * * * status resulting from circumstances over which the registrant had no control."

That a regulatory prohibition on post-induction-notice claims was deemed essential to the orderly and efficient processing of available manpower into the Armed Forces is not controverted. If registrants had been permitted endlessly to challenge their classifications, it would not only have been disruptive to the System, but also extremely unfair to those eligible registrants whose induction would necessarily have been accelerated to fill the quota vacancies left by late claimants. With this in mind, the single exception in the regulation to the prohibition on post-notice claims is designed to cover only the unusual emergency situation where an unforeseeable event, such as death in the family, may give rise to a belated claim of exemption or deferment.

In our view, this limited exception was not intended to reach post-notice conscientious objector claims. Leaving to theologians, philosophers and psychologists the age-old debate over whether the development of such beliefs are or are not beyond a registrant's "control", we think it clear that the circumstances of crystallization are not the kind of

"circumstances" contemplated by the regulation. The draftsmen intended to permit a last-minute reopening and reclassification based only on the occurrence of some objectively identifiable extraneous event or circumstance which the local board "specifically finds" to be outside the registrant's control, not on some element of a registrant's thought processes.

To construe the regulation as cutting off board consideration of post-notice conscientious objector claims is wholly consistent with the statutory provision exempting from "combatant training and service" those registrants determined by their local boards to be conscientiously opposed to war in any form. 50 U.S.C. App. 456(j). Taken as a whole, this provision was not intended to establish an absolute statutory right of exemption for all those claiming conscientious objector status. Its aim, instead, was to provide a procedural framework for the fair processing of such claims. Within that framework, timeliness has been recognized repeatedly as a valid element of the administrative system, and the regulation merely prescribes what the reasonable time limit must be.

Moreover, this reading of 32 C.F.R. 1625.2 does not deprive one whose beliefs truly crystallize after the mailing of an induction notice but before actual induction of an opportunity to assert his claim. It requires only that he, just as the soldier whose conscientious objection develops subsequent to induction, raise his claim in a different forum and have it considered by the military. If it is sustained, he will, of course, be entitled to immediate discharge.

2. The claim in the instant case was made for the first time well after the mailing of petitioner's induction notice. Thus, if the Court agrees with our interpretation of the regulation, that ends the matter. However, even if it is decided that 32 C.F.R. 1625.2 requires board consideration of post-notice conscientious objector claims, petitioner is not on this record entitled to any relief. The information in his Selective Service file warrants a finding that he was not conscientiously opposed to war in any form and that his beliefs, such as they were, had not in fact crystallized only after the induction notice was mailed. Since the board explicitly acknowledged that it had considered this information in refusing to reopen petitioner's classification, there is sufficient basis for this Court to uphold the denial of Ehlert's post-induction-notice claim.

ARGUMENT

I

A CLAIM TO CONSCIENTIOUS OBJECTOR STATUS IS NOT ENTITLED TO SELECTIVE SERVICE BOARD CONSIDERATION IF MADE AFTER THE MAILING OF AN INDUCTION NOTICE

The regulation here in question—32 C.F.R. 1625.2—provides in pertinent part that a local board is precluded from reopening a registrant's classification once it has mailed him an induction notice unless it "first specifically finds that there has been a change in * * * status resulting from circumstances over which the registrant had no control." It is settled that this prohibition was intended to prevent disrup-

tion of the Selective Service machinery by dilatory assertions of claims of exemption or deferment. *Keene* v. *United States*, 266 F. 2d 378, 384 (C.A. 10); *United States* v. *Beaver*, 309 F. 2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951. As the Second Circuit recognized in *United States* v. *Gearey*, 368 F. 2d 144, 149, "[i]f young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic, for manpower quotas could rarely be met with any degree of certainty." See *United States* v. *Delfin*, 419 F. 2d 226, 228 (C.A. 2); *Paszel* v. *Laird*, 426 F. 2d 1169, 1173 (C.A. 2). Moreover, such a practice would be unfair to other registrants whose induction is accelerated by their local boards in fulfillment of the duty to fill the quota vacancies left by late claimants. In view of these overriding policy considerations, Selective Service appropriately prohibited virtually all post-induction notice claims, recognizing but a single exception designed to cover the unusual emergency situation where an unforeseeable event, such as death in the

[6] Such acceleration of induction could cause a registrant to be drafted just prior to his twenty-sixth birthday; it could unexpectedly prevent a registrant from enrolling in a college or university, or from seeking employment in a deferred occupation. Also, it could have the effect today of inducting registrants out-of-turn under the present random selection system, possibly subjecting to the draft some whose lottery number, in the normal course of events, would not have been reached. And see the government's brief in *United States* v. *Weller*, No. 77, this Term, p. 44 n. 32.

family, may give rise to a belated claim of deferment (*e.g.*, on grounds of new hardship) or exemption (*e.g.*, as a sole surviving son). See, *e.g.*, *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9).

The precise issue raised here is whether a post-notice claim, made by a registrant who did not conclude that he was a conscientious objector until after notice was mailed, fits within the intended scope of this exception for emergent circumstances beyond the registrant's control. The Second Circuit has recently held that it does, in *United States* v. *Gearey*, *supra*,[7] but previously the regulation had consistently been construed otherwise. See *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7); *United States* v. *Bartelt*, 200 F. 2d 385 (C.A. 7); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (C.A. 3); *Feuer* v. *United States*, 208 F. 2d 719 (C.A. 9); *Leitner* v. *United States*, 222 F. 2d 363 (C.A. 4); *United States* v. *Mohammed*, 288 F. 2d 236 (C.A. 7), certiorari denied, 368 U.S. 820; *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *Porter* v. *United States*, 334 F. 2d 792 (C.A. 7); *Parrott* v. *United States*, 370 F. 2d 388 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908. In-

[7] See also the Second Circuit decisions in *United States* v. *Stafford*, 389 F. 2d 215; *United States* v. *Holmes*, 426 F. 2d 915; *United States* v. *Sandbank*, 403 F. 2d 38, certiorari denied, 394 U.S. 961; *United States* v. *Delfin*, 419 F. 2d 226; *Capobianco* v. *Laird*, 424 F. 2d 1304, petition for certiorari pending, No. 611, this Term; *Paszel* v. *Laird*, 426 F. 2d 1169.

deed, since *Gearey* only the Third Circuit has agreed that the exception should be so applied;[8] all other courts of appeals that have since passed directly on the question have refused to follow the *Gearey* rationale, holding instead that 32 C.F.R. 1625.2 forecloses consideration by the local board of any conscientious objector claim made after the mailing of an order to report for induction. *United States* v. *Al-Majied Muhammad,* 364 F. 2d 223, 224 (C.A. 4); *United States* v. *Helm,* 386 F. 2d 434, 435 (C.A. 4), certiorari denied, 390 U.S. 958; *Davis* v. *United States,* 374 F. 2d 1, 4 (C.A. 5); *United States* v. *Jennison,* 402 F. 2d 51, 52–53 (C.A. 6); *Dugdale* v. *United States,* 389 F. 2d 482 (C.A. 9); and see *United States* v. *Kroll,* 400 F. 2d 923 (C.A. 3).

This Court is now asked to overturn the weight of judicial and administrative precedent which sustains a specific cut-off date for submission of pre-induction conscientious objector claims, by either adopting the Second Circuit's interpretation of 32 C.F.R. 1625.2, as first enunciated in *Gearey,* or declaring the regulation,

---

[8] *Scott* v. *Volatile*, No. 18,546, decided September 15, 1970. But see *United States* v. *Kroll*, 400 F. 2d 923 (C.A. 3). In both the First and the Tenth Circuits, while the question has yet to be reached, there is dictum in related cases suggesting that these Circuits might well follow *Gearey*. See *United States* v. *Stoppelman*, 406 F. 2d 127, 131, n. 7 (C.A. 1), certiorari denied, 395 U.S. 981; *Martinez* v. *United States*, 384 F. 2d 50–51 (C.A. 10); *United States* v. *Maine*, 417 F. 2d 951, 953 (C.A. 10). And see *United States* v. *Hinch*, 292 F. Supp. 696 (W.D. Mo.); *United States* v. *Blaisdell*, 294 F. Supp. 1303 (D. Me.). See also *United States* v. *Brown*, 129 F. Supp. 237 (D. N.J.).

as traditionally interpreted, inconsistent with 50 U.S.C. 456(j). Neither approach, we urge, withstands close scrutiny.

A. THE MANIFEST PURPOSE OF THE REGULATION WAS TO SET AN ABSOLUTE TIME LIMIT ON CLAIMS NOT BASED ON EMERGENT EXTERNAL EVENTS

The *Gearey* case involved a post-induction-notice claim to conscientious objector status based on the registrant's assertion that his objection to war in any form "did not ripen until after he received his notice." 368 F. 2d at 149. The local board there granted the registrant a personal interview to articulate his newly formed beliefs and then concluded that "he did not qualify to be a genuine c.o." and "[a]ll facts considered [he] did not warrant a change in classification." 368 F. 2d at 147, n. 4. Gearey then refused to submit to induction, and he was convicted under 50 U.S.C. App. 462(a). On appeal, the conviction was vacated and the case remanded to determine whether the local board's action was based on a finding that the claim was in fact not genuine or, instead, was based solely on the ground that the claim was not made prior to the mailing of the induction notice. The Second Circuit stated (368 F. 2d 150):

> If the Board finds * * * that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board.

It is this interpretation of 32 C.F.R. 1625.2 which was rejected below and is again urged by petitioner here. The issue turns not on the words "change * * * in status"; rather, the lines are drawn over whether a post-notice crystallization of inchoate beliefs can result from "circumstances over which the registrant had no control" within the intended meaning of the regulation.

Petitioner and *amicus* argue forcefully that because conscientious objection is by definition a "matter of conscience", both the crystallization of beliefs and the point in time at which that occurs are *ipso facto* "circumstances over which the registrant had no control" (Br. 9, 11; Am. 6–7).[9] Reference is made to the experience of Saul of Tarsus (Br. 12), though more demonstrative of a complete religious conversion than of a crystallization of inchoate beliefs, as a typical analogue.

While we might also join the age-old debate among theologians, philosophers and psychologists (see *Paszel* v. *Laird, supra,* 426 F. 2d at 1172) as to whether or not a decision of this kind is, as an abstract matter, "involuntary" on one or another definition of that term,[10] we fail to see how such discussion in abstract

[9] "Br." references are to the Brief for petitioner; "Am." references are to the Brief of Lawyers' Selective Service Panel of San Francisco, as *Amicus Curiae.*

[10] In *Scott* v. *Volatile, supra,* slip op. 11–18 (Aldisert, J. concurring), the differing viewpoints are summarized. Thus, John Dewey and Bertrand Russell both emphasize the use of the deliberative process, while David Hume and H. H. Price

intellectual or mystical terms is pertinent to the interpretation of a Selective Service regulation. The question here is the much simpler, more concrete question of what the regulation intends by its use of the terms. The kind of exercise petitioner invites us (and the Court) to join is, in our view, a singularly inappropriate basis for any governmental decision, whether executive or judicial, and we cannot share the assumption that the regulation in question contemplates it. Our argument as to the impact of the regulation is, therefore, simply that the development of conscientious objection, whether or not some would regard it as beyond the registrant's "control," is not the kind of "circumstance" that was contemplated. See 422 F. 2d at 335 (Duniway, J. concurring).

As we have indicated, the prohibition on post-notice claims established by 32 C.F.R. 1625.2 is plainly designed as a protection against the assertion of "last minute changes in status for purposes of avoidance." *United States* v. *Beaver, supra,* 309 F.2d at 276. Before the local board is permitted to reopen after mail-

---

argue forcefully on the other side. *Id.* at 14–16. In the middle, taking a position that beliefs are at times within one's control and at other times due to emotion, are William James and C. J. Adcock. See James, *Psychology* (Briefer Course, Collier Books, 1969 ed.), 392, 426; Adcock, *Fundamentals of Psychology* (Penguin Books, 1968), 212–213. And see Freud, *The Ego and the Id* (Norton, 1962 ed.), 15, where the following point is made: "The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions."

ing an induction notice, it must not only be satisfied that a change in status has occurred but also must specifically find that the "circumstances" causing such change actually did exist and were in fact beyond the registrant's control. Unlike the pre-induction notice claim (see *Mulloy* v. *United States,* 398 U.S. 410, 415–416), it is not enough that the registrant is able to make out a *prima facie* case at the eleventh hour (see *Paszel* v. *Laird, supra* (426 F. 2d at 1172–1174);[11] he must present affirmative evidence that some event or circumstance discernably outside his control did in fact occur which in and of itself suddenly entitled him to an exemption or deferment classification—*i.e.,* a sudden death in the family (*supra,* pp. 14–15). Cf. *Petrie* v. *United States,* 407 F. 2d 267 (C.A. 9); *Badger* v. *United States,* 322 F. 2d 902, 906 (C.A. 9).

This standard, if held applicable and then applied in its terms to late conscientious objector claims, would require a registrant to demonstrate to his local board both (1) that his crystallized beliefs are now for the first time "truly held" (*United States* v. *Seeger,* 380 U.S. 163, 185) and (2) that uncontrolled circumstances in fact occurred which directly caused the crystallization. See *Scott* v. *Volatile, supra,* slip op. 5–6. Thus, before reopening the board would be compelled by the regulation to engage in precisely the kind of inquiry appropriate only for debate by theologians, philosophers, and psychologists. We cannot believe the

[11] See also our Petition for a Writ of Certiorari in *Laird* v. *Capobianco,* No. 611, this Term, pp. 7–9.

regulation intended such a result.[12] Cf. *United States* v. *Jennison, supra,* 402 F. 2d at 53; *United States* v. *Schoebal, supra,* 201 F. 2d at 32. Clearly, it is not appropriate for a local draft board to examine the mental processes by which a registrant claims he arrived at his beliefs. *United States* v. *Seeger, supra,* 380 U.S. at 184–185. One hardly can expect a board to cope effectively with the perennial controversy over whether "matters of conscience" are within or without a person's control. As this Court has indicated, while "[s]ome theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts * * * these are inquiries foreclosed to Government." *United States* v. *Seeger, supra,* 380 U.S. at 184.

Indeed, the *Gearey* decision implicitly recognizes as much, but argues instead for an irrebuttable presumption in favor of late conscientious objector claimants—*i.e.,* if they can show a change in status, such "change" wa *sipso facto* due to circumstances beyond their control within the meaning of the regulation (368 F. 2d at 150). But any such rule is contrary to the clear intent of the regulatory language, for it reads out of the proviso the most essential element of proof necessary for the extraordinary relief of last-minute reclassification. It thus requires for certain claimants a post-notice reopening on precisely the type of showing (change in

[12] Judge Duniway, concurring below, observed: "[t]he word 'circumstances' indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual processes of the registrant himself." 422 F. 2d at 335.

status, and nothing more) which the drafters of the regulation manifestly demed to be inadequate.[13] Moreover, it assumes the very theological-philosophical-psychological point which remains in controversy; whether matters of conscience are actually voluntary

[13] In *United States* v. *Stafford*, 389 F. 2d 215, the Second Circuit, applying the *Gearey* rationale, read the regulation as requiring a postponement of induction for purposes of according the board an opportunity to review a C.O. claim based on late crystallization where the written claim is raised for the first time *at the induction station*. And in *United States* v. *Holmes*. 426 F. 2d 915 (C.A. 2), the same result was reached where the claim was made *orally* for the first time at the induction center (which was also the situation in the instant case). Both decisions rested on the Second Circuit's conclusion that it is reasonable to consider the induction station as merely an arm or agent of the Selective Service administrative agency and thus as an instrumentality of the local board for purposes of receiving a belated conscientious objector claim. Thus *Gearey*, as extended by *Stafford* and *Holmes*, stands for the proposition that a postponement of induction is automatic on the mere assertion at the induction station of a post-notice claim, notwithstanding the fact that no written request to reopen and reclassify is made to the local board pursuant to 32 C.F.R. 1623.1(b) and 1625.2. Such an interpretation of 32 C.F.R. 1625.2 totally disregards the very nature and purpose of the questioned proviso—*i.e.*, the prevention of substantial disruption to the Selective Service machinery by dilatory assertions of claims of exemption or deferment. These considerations apply with particular force to relieve the Selective Service System from the necessity of affording a lengthy delay in induction. *Blades* v. *United States*, 407 F. 2d 1397, 1399–1400 (C.A. 9). As the court below correctly observed in *Palmer* v. *United States*, 401 F. 2d 226, 227–228, "[c]lassification functions of the local board cease with induction, and a registrant cannot, by refusing to submit to induction, impose upon the board any new duties respecting reclassification or reopening." See *Martinez* v. *United States*, 384 F. 2d 50, 51 (C.A. 10); *United States* v. *Stoppelman*, 406 F. 2d 127, 131–132 (C.A. 1); *Straight* v. *United States*, 413 F. 2d 263, 264 (C.A. 9).

or involuntary is a question no more appropriate for the courts to answer than for the local boards. Cf. *United States* v. *Seeger, supra,* 380 U.S. at 185; *Welsh* v. *United States,* 398 U.S. 333, 339. And even if it were permissible for the courts to pass judgment upon such a matter, there is nothing in the reasoning of *Gearey* or in the arguments in the instant case that justifies the conclusion that *every* late-blooming conscientious objection is the product of forces beyond the registrant's "control", the conclusion that necessarily underlies the reading of the regulation that *Gearey* and petitioner here suggest.[14]

Accordingly, the provision of the regulation allowing limited emergency reopenings by local boards cannot reasonably be read as intended to cover late conscientious objector claims.[15] Clearly what the drafts-

[14] See pp. 26–27, n. 19, *infra.* Moreover, since an alleged "crystallization" or "maturation" of conscientious objector beliefs necessarily contemplates the existence of inchoate antiwar sentiments, which in varying degrees are harbored by registrants prior to the date they ripen, the *Gearey* presumption would make it virtually impossible to distinguish the true late crystallizer from the conscientious objector who was always sincerely opposed to war in any form but simply delayed in asserting his claim until after the mailing of an induction notice. See *infra*, p. 31.

[15] We point out that our reading of the regulation does no more than push forward the final date for assertion of such claims before the board from the date of induction to the date of mailing a notice of induction. Thus, in the vast majority of crystallization cases, registrants who, as petitioner, had been "unable to make a decision of such moment until faced with the absolute necessity to do so" (Br. 1), will find themselves faced with such an "absolute necessity" at the time of the I–A classification, rather than at the time they are to take the symbolic step forward at the induction center. *Supra*, n. 13.

men of the regulations contemplated by the questioned language, as we have already pointed out, was simply the occurrence of some objectively identifiable extraneous event or circumstance which the local board could specifically find to be outside the registrant's control, and not some element of a registrant's internal thought processes.

The argument is made that to adhere to such a narrow interpretation has the effect of singling out conscientious objectors as the only claimants seeking exemption or deferment status who are unable to obtain board reclassification after the mailing of an induction notice. We point out initially that, even if this were the case, it would not suggest a basis for invalidating the regulation. It is well settled that "no one has a constitutional right to exemption from military service." *United States* v. *Beaver, supra,* 309 F. 2d at 276; cf. *Warren* v. *United States,* 177 F. 2d 596, 598–600 (C.A. 10), certiorari denied, 338 U.S. 947. Perhaps equally relevant is the fact that conscientious objectors are indeed not alone in this respect. Also foreclosed from further consideration after the designated cut-off date are claims of a change to student (II–S) deferment status or occupational (II–A) deferment status, for example. Cf. *Scott* v. *Volatile, supra,* slip op. 2. It is quite clear, then, that the exception to the proviso is not directed, either favorably or unfavorably, at any specific class of claimants; it is drafted so as to meet exceptional emergency situations if and when they arise.

It is contended, however, that a rejection of the *Gearey* rationale by this Court would forever preclude a

conscientious objector whose beliefs crystallize late from asserting his claim (Br. 21). But this is not true. While it is true that the claim can no longer properly be raised before the local board, it can be considered by the military immediately upon induction; the suggestion that the military would offer no relief for any conscientious objection developed between a registrant's notification and his induction is, as Judge Ely (concurring below) observed, "more fancied than real" (422 F. 2d at 337, n. 3). Department of Defense directive No. 1300.6 (August 21, 1962), only part of which has been relied on by petitioner (Br. 22), plainly deals with post-induction claims which could have been raised "prior to *notice of* induction" but were not [16] (emphasis supplied). At the time this action was commenced, the Directive stated explicitly that "failure to make *timely* claim for exemption constitutes *waiver* of the right to claim" (emphasis supplied), and then, continuing with the word "Therefore," [17] went on to declare that a con-

[16] There is, then, no substance to the "hiatus" problem which disturbs petitioner (Br. 21–24) and the dissenting judges below. See 422 F. 2d at 339. All conscientious objectors whose claims are sustained by the local board prior to the mailing of an induction notice are on the same footing under Section 6(j) (see *infra*, pp. 30–31). Those whose beliefs allegedly crystallize subsequent to such mailing date will be processed by the armed forces under the applicable military procedures (*infra*, n. 18).

[17] Recently the directive has been restructured so as to begin with what formerly was the second sentence, followed by this language: "*This accords with* Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to *notice* of induction and failure to make *timely* claim for exemption constitutes waiver of the right to claim." Department of Defense Directive No. 1300.6 (May 10, 1968) (emphasis supplied).

scientious objector claim "which existed but was not claimed [*i.e.*, had been waived] prior to induction * * * cannot be entertained." Thus, when the language quoted by petitioner is properly read in connection with the unequivocal policy statement directly preceding it, it follows that "the thrust of the directive is toward claims arising before the induction notice" (422 F. 2d at 337, n. 3). It was not designed to exclude claims which a registrant had not waived but rather, due to late crystallization, had never had an opportunity to assert prior to induction.[18] Nor to our knowledge has the Directive ever been so applied.[19]

[18] As to such claims, the various military services have prescribed specific procedures for investigating and processing such claims and, where appropriate for granting discharges. Department of Defense Directive No. 1300.6 (May 10, 1968) expressly declares that, "[s]ince it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service standards used in determining I–O or I–A–O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service." And see Army Regulation AR 635–20 (January 1, 1970); Navy Department BUPERINST 1900–5 (July 18, 1968); Marine Corps Order MCO 1306.16B (June 18, 1969). Air Force Regulation AFR 35–24 (March 25, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

[19] Even if we could accept the abstract general approach to the problem of late-blooming conscientious objection that petitioner advocates, we do not believe that, on the facts as petitioner has presented them in this litigation, he could claim that his alleged crystallization of beliefs was an occurrence in any meaningful sense beyond his control. Petitioner claims that he has harbored vague antiwar sentiments before his induction notice came, and that they did not ripen into a "conscientious objection" until several weeks after that date. In his words, he had been "unable to make a *decision of such moment* until faced with the absolute necessity to do so" (Br. 1; emphasis sup-

B. THIS LIMITATION ON POST-NOTICE CLAIMS IS AUTHORIZED BY STATUTE AND DOES NOT CONFLICT WITH SECTION 6(j) OF THE ACT

Petitioner contends that the questioned proviso of the regulation, if interpreted as foreclosing further board consideration of conscientious objector claims after the mailing of an induction notice, is neither authorized by statute nor consistent with 50 U.S.C. App. 456(j) and therefore must be declared invalid. We cannot agree.

---

plied). In these circumstances, we think it clear that the ultimate decision to claim conscientious objector status is a matter of rational thought well within the registrant's control. Perhaps the triggering event which prompts such a momentous decision may be a circumstance over which the registrant had no control (though we cannot view the receipt of an induction notice containing information already known to the registrant as so dramatic and unexpected that it falls within this category), but the decision itself seems in any event to be a rational one. Moreover, even if the time when a registrant finally *makes* that decision once he has put his mind to it were a circumstance over which he has no control, it is not altogether clear that he cannot control the time when he chooses directly to confront the problem and *start* the thinking process. As the court below observed in another case "[a]n average man of average intelligence, who can read, must daily realize that he may, once he is subject to a draft call from his board due to his designated classification, be 'soon' called upon to kill." *Parrott* v. *United States*, *supra*, 370 F. 2d at 396. Is it, then, unreasonable to require that he sit down at the outset and think through his inchoate objections to war, rather than encourage him to postpone the decision to the eleventh hour? We think not.

Thus, petitioner's particular claim can be rejected without becoming too deeply embroiled in theological-philosophical-psychological disputation. In contrast, acceptance of his claim would, as we have shown, either require that local boards decide other, closer cases on the basis of such disputations or else unjustifiably emasculate the basic regulation by establishing an irrebuttable presumption that all crystallizations of conscientious objection are uncontrollable circumstances (see n. 14 *supra*).

The Universal Military Training and Service Act, like the present law,[20] contained a provision authorizing the President to prescribe the rules and regulations necessary for its administration. 50 U.S.C. App. 460(b)(1). Under this grant of power, President Eisenhower signed Executive Order No. 10594 on January 31, 1955, setting forth in its entirety the present language of 32 C.F.R. 1625.2.[21] The complete regulation, including the prohibition on reopening questioned here, was manifestly intended to have application to all claims of exemption or deferment, and so must be considered in this broad context—not simply in the narrow context of conscientious objection—in ascertaining its statutory authorization. So viewed, the establishment (in the vast majority of cases) of an absolute cut-off for further requests to reopen and reclassify at the point of the final act by the local draft board in processing a registrant for induction (*i.e.*, the mailing of a notice to report) is not

[20] Petitioner was convicted under the Universal Military Training and Service Act rather than under the present Military Selective Service Act of 1967. There are two variations, not directly pertinent here, between the version of the exemption section (50 U.S.C. App. 456(j)) appearing in the present statute and the version which appeared in the statute under which petitioner was convicted: the earlier form of the section contained a definition of "religious training and belief" and also provided certain rights of administrative appeal for registrants to whom local boards denied classification as conscientious objectors. Both provisions were omitted from the 1967 statute; provision for appeal is now found only in the Selective Service regulations (see 32 C.F.R. 1626, 1627).

[21] In 1942, two years after the Selective Service Training Act became law, the President promulgated former 32 C.F.R. 626.2 which is substantially similar to what is today 32 C.F.R. 1625.2.

"unreasonable or de rogatory to the spirit and pur-
pose" (*Keene* v. *Unit ed States,* 266 F. 2d 378, 383 (C.A.
10)) of the Act. On th e contrary, the courts have consist-
ently recognized that "[w]ithout such a regulation, the
manpower quotas of Selective Service could not be met
with any degree of certainty." 422 F. 2d at 334;
United States v. *Delf in, supra,* 419 F. 2d at 228; *Paszel* v.
Laird, supra, 426 F. 2d at 1173. As earlier indicated,
not only is it es sential to the achievement of
what is indisputably the single most important objec-
tive of the System—the orderly and efficient process-
ing of available man power into the Armed Forces (cf.
United States v. *N ugent,* 346 U.S. 1, 9; *Falbo* v.
United States, 320 U.S. 549, 553; see also *Estep* v.
United States, 327 U.S. 114, 140 (Frankfurter, J.,
concurring))—it al so substantially reduces injustices
resulting from an o therwise unnecessary order of in-
duction of another e ligible registrant to meet quota re-
quirements (*supra,* p. 14, n. 6). As observed even in
Gearey (368 F. 2d a t 149), "[y]ears of experience have
demonstrated that it is necessary and reasonable to set
limits on the time in which a claim must be as-
serted. * * *." [22]

[22] In *Kramer* v. *Uni ted States,* VDG F. 2d 756, 759 (C.A. 6),
it was said, "The Supr eme Court has declared that legislation
must be often adapte d to conditions involving details with
which it is impractica ble for the legislature to deal directly;
and that the Constituti on does not deny to Congress 'the neces-
sary resources of flexi bility and practicality, which will enable
it to perform its func tion in laying down policies and estab-
lishing standards, whi le leaving to selected instrumentalities
the making of subord inate rules within prescribed limits and
the determination of f acts to which the policy as declared by
the Legislature is to a pply.' *Currin* v. *Wallace,* 306 U.S. 1, 15;
Panama Refining Co. v. *Ryan,* 293 U.S. 388, 421. * * *"

Even so, petitioner argues that, to the extent the regulation has application to conscientious objector claims and is construed as it was below, it is contrary to the statutory mandate of 50 U.S.C. App. 456(j), which provides in part that "[n]othing" shall require conscientious objectors "to be subject to combatant training and service in the armed forces." The quoted statutory language, however, cannot be read in isolation. Section 6(j) as a whole makes clear that Congress did not intend to establish an absolute statutory right of exemption for all those claiming conscientious objector status. See *Clark* v. *United States,* 236 F. 2d 13, 21 (C.A. 9). Its aim, instead, was to provide a procedural framework (*United States* v. *Gearey, supra,* 368 F. 2d at 150; *Keene* v. *United States, supra,* 266 F. 2d at 383–384) for the fair processing of conscientious objector claims alleged to come within the statutory definition. Cf. *United States* v. *Seeger, supra; Welsh* v. *United States, supra.* Thus, the first sentence of the section, on which petitioner and *amicus* rely so heavily, has effect, in light of the third sentence of Section 456(j), only where such a claim *"is sustained by the local board"* (emphasis supplied). If a claimed exemption is denied by the board and on appeal within the Selective Service System, a registrant is subject to "combatant training and service" under the statute if the denial, even though perhaps erroneous (*Estep* v. *United States,* 327 U.S. 114, 122–123), has a "basis in fact." *Witmer* v. *United States,* 348 U.S. 375, 377; *Dickinson* v. *United States,* 346 U.S. 389; *Mulloy* v. *United States, supra,* 398 U.S. at 416. Accordingly, the statutory scheme does not establish a judicially enforceable right to

exemption, but more simply a system for fair administrative consideration of exemption claims.

To construe the word "nothing" in the manner urged by petitioner would not only have the effect of rendering all but the first two sentences of Section 6(j) meaningless; it would also require local boards to recognize conscientious objector claims whenever made, including those that could have been asserted prior to the mailing of an induction notice but were not communicated to the board until after that date. That argument has been uniformly rejected by the various courts of appeals *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2); *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273 (C.A. 4), certiorari denied, 371 U.S. 951; *United States* v. *Kanner*, 416 F. 2d 522 (C.A. 9); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7). Quite clearly, then, timeliness is a valid element of the administrative system; the purpose of the statute goes no further than to assure that the Selective Service process will exempt from "combatant training and service" [23] those whose timely claims to conscien-

[23] We emphasize further that the provision makes explicit reference to "combatant training and service." Plainly, "[c]onscientious objector status does not *per se* excuse the registrant from *induction*." *United States* v. *Beaver*, *supra*, 309 F. 2d at 276 (emphasis supplied). Indeed, Section 6(j) provides expressly that even where a claim "is sustained by the local board," a conscientious objector may be "*inducted* into the armed forces under this title" and "assigned to noncombatant service" (emphasis supplied).

tious objector status are (within the limited constraints of judicial review) sustained by the local board or the appeal board.[24] Cf. *Cark* v. *United States, supra,* 236 F. 2d at 21. The regulatory proviso of 32 C.F.R. 1625.2, establishing the mailing of an induction notice as the final cut-off date for submitting such claims to local boards, is entirely consistent with this scheme. *United States* v. *Kroll,* 400 F 2d 923 (C.A. 3). As stated by the Sixth Circuit in *United States* v. *Taylor,* 351 F. 2d 228, 230:

> It seems reasonable to this court (and in accord with the great weight of authority) for regulations of the selective service system to provide that a claim of conscientious objector

[24] The argument by *amicus* (Am. pp. 17–19) that the statute thus "creates two classes [of registrants]" in violation of equal protection of the laws is without substance. As we have demonstrated, it is not "unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening and reclassification shall be entertained after notice to report for induction is mailed." *Keene* v. *United States,* 266 F. 2d 78, 383–384. Such a cut-off date does not deny sincere conscientious objectors whose beliefs crystallize late an opportunity to claim exemption from "combatant training and service in the armed forces." It merely requires, for valid policy reasons (*supra,* pp. 28–29), that they assert their claim after induction and have it processed pursuant to the applicable military regulations, rather than pursuant to the Selective Service regulations. "There is here no interference with defendant's right to adopt and believe the religion of his choice. To the extent that his freedom of desired action in the practice of his religious faith is curtailed, that curtailment is a permissible result of the selective service laws adopted and enforced for the protection of the nation." *United States* v. *Mohammed,* 288 F. 2d 236, 244 (C.A. 7), certiorari denied, 368 U.S. 820. See *Warren* v. *United States, supra,* 177 F. 2d at 598–600.

status must be made before the individual concerned has been notified to report for induction.[25]

II

EVEN ASSUMING POST-NOTICE CLAIMS OF CONSCIENTIOUS OBJECTION ARE ENTITLED TO BOARD CONSIDERATION, THE REFUSAL TO REOPEN WAS WARRANTED IN THE PRESENT CASE

Though the local board stated no reasons for its refusal to reopen after consideration of petitioner's conscientious objector claim,[26] it did indicate in a subsequent letter (*supra*, p. 8) that the basis for its action was its inability to find, on reviewing the entire file (including information submitted in the SSS Form 150) "under the provisions of Part 1625" of the regulations, "a change in [petitioner's] status which was beyond [his] control" (A. 61). We submit that even if the Court were to adopt the *Gearey rule*, a reopening would not be required on the facts of this case.

1. *Amicus* suggests that reopening is required if a court finds that petitioner made a *prima facie* showing

[25] Due process does not require that the cut-off date selected be contingent upon something within the control of the registrant; so long as it has a reasonable relation to the overriding purpose of the statute (see *supra*, pp. 28–29), it will not be considered unconstitutionally "arbitrary and capricious" (Am. 19). See *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (Holmes, J., dissenting).

[26] Here the local board entertained the claim subsequent to petitioner's first refusal to submit to induction only after the United States Attorney declined prosecution so as to afford the board an opportunity to review the information submitted, and the state Selective Service director instructed the board to consider petitioner's Form 150. See *supra*, pp. 7–8.

of conscientious objector status (Am. 10–13). However, the regulation governing reopening expressly provides that the board is permitted to reopen in the post-notice situation only if it "first specifically finds" a change resulting from circumstances beyond the registrant's control. 32 C.F.R. 1625.2. Thus, the *prima facie* showing that would be sufficient to warrant a pre-notice re-opening (*Mulloy* v. *United States,* 398 U.S. 410)—where the board has unrestricted power under the regulation if new facts are presented [27]—will not suffice when the claim is submitted after a notice of induction has been mailed. *Paszel* v. *Laird, supra; Scott* v. *Volatile, supra; United States* v. *Bowen,* 421 F. 2d 193, 197 (C.A. 4). See our Petition for a Writ of Certiorari in *Laird* v. *Capobianco,* No. 611, this Term, pp. 7–9.

It follows that a board determination to refuse a post-notice reopening, resting as it does on determinations of fact, is subject to judicial review only to the same extent as an original classification by the board.[28] *United States* v. *Gearey,* 379 F. 2d 915 (C.A. 2), certiorari denied, 389 U.S. 959; *United States* v. *Moham-*

[27] 32 C.F.R. 1625.4 states only that a board shall not reopen in any event where no new facts are presented, or where new facts are presented which "*if true*, would not justify a change"—*i.e.*, where no *prima facie* showing has been made (emphasis supplied).

[28] The traditional rule, first laid down by this Court (*Estep* v. *United States*, 327 U.S. 114, 122–123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380–381), and now codified by statute (50 U.S.C. App. (Supp. V) 460 (b)(3)), has been that the classification assigned by the local board is valid and not subject to review if it has a "basis in fact" discoverable from the record.

med, supra, 288 F. 2d 236, 238. In both instances, the action taken must be upheld if it has a "basis in fact" discoverable from the record. *Estep* v. *United States,* 327 U.S. 114, 122–123; *Witmer* v. *United States,* 348 U.S. 375, 380–381. "[I]t is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." *Witmer* v. *United States, supra,* 348 U.S. at 380–381; *Dickinson* v. *United States,* 346 U.S. 389, 394.

In the instant case there is ample evidence to support the Board's refusal to reopen (assuming *arguendo* that such reopening is allowed). Even under *Gearey,* the registrant is not entitled to reclassification unless the "Board finds * * * that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector" (368 F. 2d at 150). Since exempt status is a matter of legislative grace (*Keene* v. *United States, supra,* 266 F. 2d at 383), it is the registrant who "bears the burden of clearly establishing a right to the exemption." *Dickinson* v. *United States, supra,* 346 U.S. at 395. Here, as Judge Ely (concurring below) emphasized, Ehlert failed to supply "the barest basis, even vestigial," upon which his board could have made even the minimal *Gearey* findings. 422 F. 2d at 336.

2. With respect to the timing of his alleged "change in status", Ehlert represented in his Form 150 responses (A. 54–57) that he had "received the training and acquired the belief which [was] the

basis of [his] claim" during "[t]he time period * * * from September 1960, to the present" (*i.e.*, July 1965). He identified the "source and method" of his training as "the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." His claim was late, he stated, due to an inability "to make a decision of such moment until faced with the absolute necessity to do so"; and added: "Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." (A. 51).

From this information, the board could well have concluded that "Ehlert had long been aware of his beliefs but had simply been unable to decide whether to claim the status to which he felt entitled."[29] 422 F. 2d at 336 (Ely, J., concurring). And as District Judge Zirpoli observed, support for this interpretation can be found in the five-year period it allegedly took the "natural workings of [his] eager-to-know and questioning mind" to develop his objection, coupled with the fact that Ehlert did not assert his claim until faced with boarding the bus to the induction center, almost a full month following receipt of the notice to report. 422 F. 2d at 336. The board's action is, then, clearly sustainable in that there is, at the very least, a "basis in fact" for finding on this record that Ehlert did not experience a crystal-

[29] District Judge Zirpoli indicated at trial that he was then inclined to place just such a construction on these statements. See 422 F. 2d 336.

lization of inchoate beliefs only after receipt of the notice.

3. Indeed, there is every reason to conclude that, even assuming a late maturation, the beliefs petitioner held at the time of his claim did not qualify him as a conscientious objector. Thus, he expressed the view that "service in the armed forces of this country *at this time* is work toward the end of the destruction of the human race." (A. 54; emphasis supplied). His "duty", he said (A. 54), "not to work for the destruction of the human race is superior to any duties which may arise from any human relation." Accordingly, he "believe[d] in the use of force * * * [*u*]*nder any circumstances* in which the use of force would not make *more probable* the destruction of the human race" (A. 55). As he assessed the present situation, however, "the sole purpose of military service in this country *today* is preparation for a nuclear orgasm which would be totally destructive of human life and values" (A. 51).[30]

These statements could reasonably be read as reflecting an "objection to war [which] does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy" (*Welsh* v. *United States, supra,* 398 U.S. at 342–343) *i.e.,* petitioners' views are "essentially political, sociological or philosophical" or emanate from a "merely personal code." 50 U.S.C. App. 456(j). His objection was

[30] In the same letter, he also stated: "[s]ince the receipt of my induction notice, I have begun to be more fully aware of the implications of military service *at this time*" (emphasis supplied).

not to "participation in war in any form" as required by Section 6(j), but, at best, constituted a "selective" objection, which is no basis for exemption unless this Court holds to the contrary in *Gillette* v. *United States,* No. 85, this Term, or *Negre* v. *Larsen,* No. 325, this Term. Thus, contrary to the assumption of *Amicus* (Am. 12), petitioner's selective service file can be read as failing to present even a *prima facie* claim to conscientious objector status.[31]

4. Accordingly, irrespective of its decision on the timeliness issue, this Court may, on the basis of the record now before it, appropriately uphold the action of the local board in denying Ehlert's post-induction-notice claim. There is not here the question which prompted a remand in *Gearey*—"whether the Board * * * refused to *consider* [the] claim simply because of the late date at which it was raised" (*United States* v. *Gearey,* 379 F. 2d at 919—*Gearey II;* see also 368 F. 2d at 150–151). That issue could not be resolved in *Gearey I* because nothing said by Gearey's local board indicated that his file had been considered and, since he had stated a *prima facie* claim (*supra* n. 31), the court could find nothing in his papers suggesting a basis in fact for the board's refusal to re-

[31] It is immaterial that, as petitioner urges, he was not accorded the "courtesy" interview which Gearey received (Pet. Br. 25–26). Gearey had stated a *prima facie* claim; it took a personal appearance for the board to determine that his claim was not "genuine." Since petitioner did not state a *prima facie* claim, the question whether it was really his stated beliefs which motivated him was not put in issue and there was therefore no occasion to interrogate him personally.

open.[32] Here, in contrast, Ehlert's board wrote him a letter (A. 61) informing him specifically that it had "reconsidered [his] classification" on the basis of "the information submitted on" his Form 150. Moreover, as we have shown, there was here no *prima facie* showing of conscientious objection, and there was a basis for concluding that petitioner's beliefs, such as they were, had not in fact crystallized only after the notice was mailed. Had that been the situation presented in *Gearey I*, there would have been no occasion for a remand and *Gearey II*. Cf. *United States* v. *Broyles*, 423 F. 2d 1299, 1302–1304 (C.A. 4). On such a record, the board is thus entitled to have its refusal to reopen upheld by this Court. See 422 F. 2d at 336–337 (Ely, J., concurring).

CONCLUSION

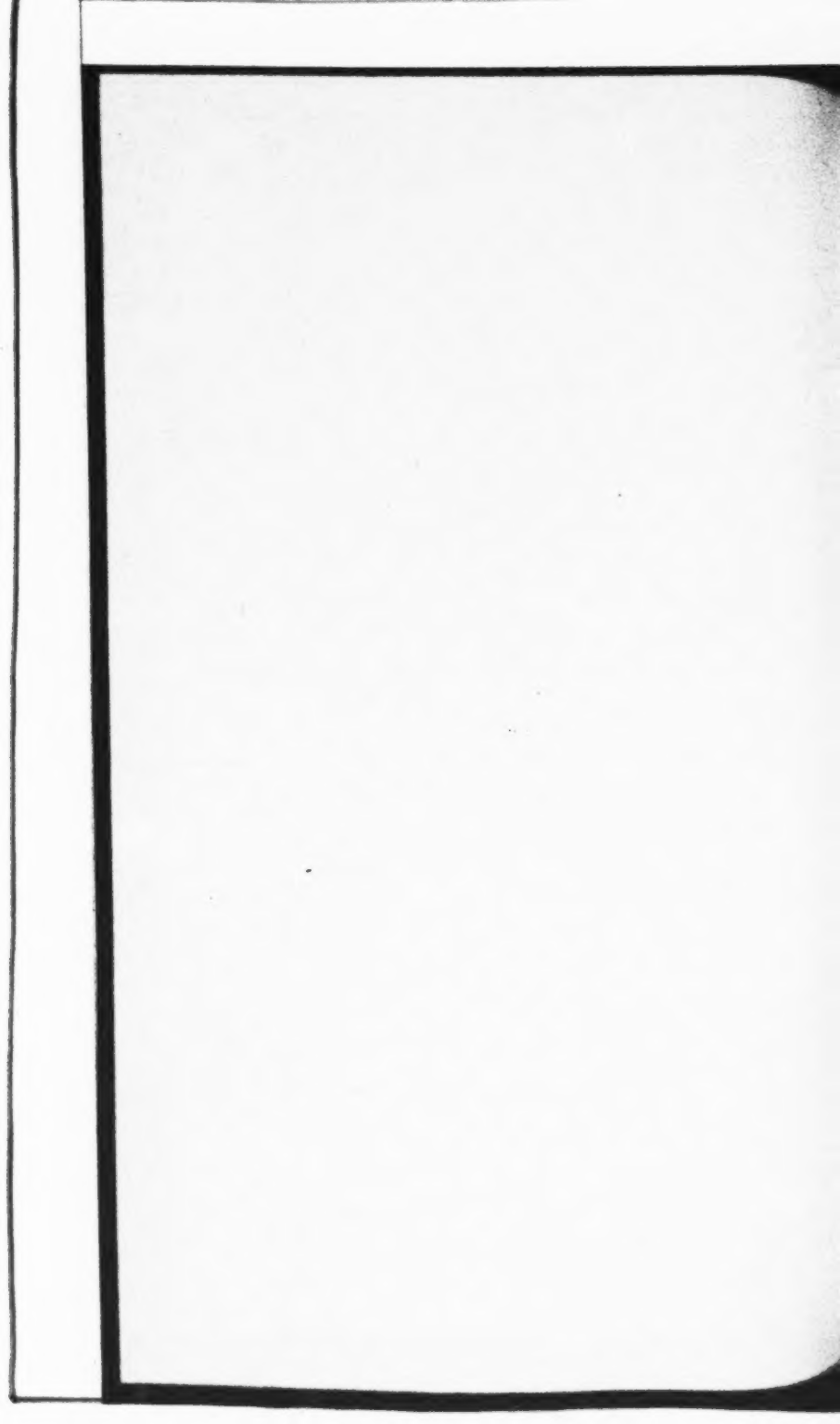
For the foregoing reasons, the judgment of conviction should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

OCTOBER 1970.

[32] Thus, the district court was ordered to conduct a hearing to determine whether the board members concluded, on the basis of their courtesy interview with the registrant, that Gearey was not sincere in his beliefs. After such a hearing, the conviction was upheld when *Gearey II* upheld the trial court's determination that the local board had so found.

U.S. GOVERNMENT PRINTING OFFICE: 1970



Subject Index

Page

A. 32 CFR 1625.2 cannot preclude the reclassification of a conscientious objector whose views matured after the mailing of an order to report for induction 1

1. The weight of authority does not compel the denial of reopening to the late-maturing conscientious objector 7

2. Construction of the regulation 12

(a) Legislative history and administrative authority 12

(b) The plain language of the regulation 13

(c) There are no policy considerations of sufficient weight to justify denying the late-maturing conscientious objector the right to a reopening after mailing of an order to report for induction 16

3. The government's interpretation of the regulation creates a class of conscientious objectors who are denied a forum to assert their claims 19

B. Ehlert's claim entitled him to a reopening and a reclassification 25

Conclusions 29

Table of Authorities Cited

Cases	Pages
Aquilino v. Laird, 316 F.Supp. 1053 (W.D. Texas 1970), on remand from 5th Circuit, 429 F.2d 573 (5th Cir. 1970)	20
Baker v. Laird, 316 F.Supp. 1 (1970)	21, 22, 23
Boyd v. United States, 269 F.2d 607 (9th Cir. 1959)	7
Capobianco v. Laird, 424 F.2d 1304 (2d Cir. 1970)	26
Davis v. United States, 374 F.2d 1 (5th Cir. 1967)	7
Dugdale v. United States, 389 F.2d 482 (9th Cir. 1968)	8
Estep v. United States, 327 U.S. 114 (1946)	4
Feuer v. United States, 208 F.2d 719 (9th Cir. 1953)	8
Goodwin v. Laird, No. C-70-808 (N.D. Cal., June 19, 1970), 3 Sel.Serv.L.Rep. 3151	20
Keene v. United States, 266 F.2d 378 (10th Cir. 1959)	10
Leitner v. United States, 222 F.2d 363 (4th Cir. 1955)	8
O'Callahan v. Parker, 395 U.S. 258 (1969)	25
Parrott v. United States, 370 F.2d 388 (9th Cir. 1966), cert. denied 387 U.S. 908	7
Paszel v. Laird, 426 F.2d 1169 (2d Cir. 1970)	3, 26
Peterson v. Laird, No. C-70-807 (N.D. Cal., Aug. 12, 1970), 3 Sel.Serv.L.Rep. 3120	2
Porter v. United States, 334 F.2d 792 (7th Cir. 1964)	7, 11
Scott v. Volatile, No. 18,546 (3d Cir., Sept. 15, 1970)	3
Scott v. Volatile, ... F.2d ..... (3d Cir. 1970)	4, 6, 26, 28
United States ex rel. Barr v. Resor, 309 F.Supp. 917 (D. D.C. 1969)	20
United States ex rel. Berman v. Craig, 207 F.2d 888 (3d Cir. 1953)	9, 15
United States ex rel. Berman v. Resor, 429 F.2d 1340 (10th Cir. 1970)	3
United States ex rel. Healy v. Beatty, 424 F.2d 299 (5th Cir. 1970)	20
United States v. Abbott, 425 F.2d 910 (8th Cir. 1970)	26
United States v. Al-Majied Mohammad, 364 F.2d 223 (4th Cir. 1966)	11

Pages

United States v. Bartelt, 200 F.2d 385 (7th Cir. 1952).... 7
United States v. Broyles, 423 F.2d 1299 (4th Cir. 1970)... 26
United States v. Freeman, 388 F.2d 246 (7th Cir. 1967)... 17
United States v. Gearey I, 368 F.2d 144 (2d Cir. 1966), cert. denied 389 U.S. 959 ..... 3, 10
United States v. Gearey II, 379 F.2d 915 (2d Cir. 1967), cert. denied 389 U.S. 959 ..... 3, 8
United States v. Haughton, 413 F.2d 736 (9th Cir. 1969) 26
United States v. Helm, 386 F.2d 434 (4th Cir. 1967), cert. denied 390 U.S. 958 11
United States v. Jennison, 402 F.2d 51 (6th Cir. 1958), cert. denied 394 U.S. 912 8
United States v. Kroll, 400 F.2d 923 (3d Cir. 1968), cert. denied 393 U.S. 1069 7
United States v. Maine, 417 F.2d 951 (10th Cir. 1969).... 3
United States v. Mohammed, 288 F.2d 236 (7th Cir. 1961), cert. denied 368 U.S. 820 8
United States v. Sandbank, 403 F.2d 38 (2d Cir. 1968), cert. denied 89 S.Ct. 1301 3
United States v. Schoebel, 201 F.2d 31 (7th Cir. 1953)....11, 12
United States v. Seeger, 380 U.S. 163 (1965)..... 5, 28
United States v. Taylor, 351 F.2d 228 (6th Cir. 1965).... 7, 8
United States v. Underwood, 151 F.Supp. 874 (E.D. Pa. 1955) 15
United States v. Weller, No. 77, Oct. Term 1970 24

Welsh v. United States, 398 U.S. 339 (1970).....26, 28

Codes

32 C.F.R.:
Section 1261.11 6
Section 1606.51(a) 6
Section 1622.22 .....15, 17
Section 1625.1(b) 6
Section 1625.2 .....1, 16, 21

50 U.S.C. App.:
Section 451 et seq. 23
Section 456(j) 18, 19
Section 460(b)(3) 24
Section 462(a) 16

Regulations

Army Regulations: Pages
635-20, para. 3b(2) 20, 21
635-200 15

Statutes

Title I, Section 6, 62 Stat. 613 7
Pub.L. 90-40 Section 1(1), 81 Stat. 100 23
Military Selective Service Act of 1967 ..... 12, 23

Miscellaneous

113 Congressional Record, May 25, 1967:
Page 14094 ..... 12, 13
Page 14119 ..... 23, 24
Department of Defense Directive 1300.6 ..... 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

A. 32 CFR 1625.2 CANNOT PRECLUDE THE RECLASSIFICATION OF A CONSCIENTIOUS OBJECTOR WHOSE VIEWS MATURED AFTER THE MAILING OF AN ORDER TO REPORT FOR INDUCTION

The Government has taken the position advanced by Judge Duniway concurring below, that "the development of conscientious objection, whether or not some would regard it as beyond the registrant's 'control,' is not the kind of circumstance that was contemplated" by the regulation. (R.O.B. 19.)[1]

[1] R.O.B. refers to the Government's Opening Brief. "The Regulation" refers to 32 CFR 1625.2.

The Government thereby abandons the rationale of the majority below, that "presumptively every human is a rational being having a free will and in complete charge of his own thinking." Appendix (hereinafter A) 34.[2]

The Government reasons as follows: If it is held that late-maturing conscientious objection views *are* a change in the registrant's status due to circumstances beyond his control, then the language of the regulation terminating the right to reopening and reclassification after an order to report for induction is mailed will be read out of the regulation, and dilatory claims must be heard, to the detriment of the smooth supply of manpower to the military.

Second, the Government reasons that if late-maturing conscientious objection views *may be* a change in status requiring reopening, then the local boards will be plunged into a thicket of philosophical speculation inappropriate to their nature and function.

Therefore, the Government continues, such claims are not within the intended ambit of the regulation, and no reopening or reclassification may be had.

The rule for which petitioner argues is as follows:

When the local board is presented with a post-induction-order prima facie conscientious objector claim, i.e., one which on its face would entitle the claimant to the exemption sought, the local board must make a finding as to when the views matured.

---

[2]However, the Government attempts to create a mind-set for this dubious proposition, without citing any authority which would support such a conclusion. (R.O.B. 15, 17, 22, 23, and 27.)

If the board finds that the views matured after the order to report for induction was mailed, it must reopen and reclassify the registrant. *United States v. Gearey I,* 368 F.2d 144 (2d Cir. 1966), Cert. Denied 389 U.S. 959; *United States v. Gearey II,* 379 F.2d 915 (2d Cir. 1967), Cert. Denied 389 U.S. 959; *Paszel v. Laird,* 426 F.2d 1169 (2d Cir. 1970); *Scott v. Volatile,* No. 18,546 (3d Cir. Sept. 15, 1970); *United States ex rel. Berman v. Resor,* 429 F.2d 1340 (10th Cir. 1970).[3]

This rule in no way "reads out of the proviso the most essential element of proof necessary for the extraordinary relief of last-minute classification" by requiring only a showing of prima facie entitlement to I-O classification, as asserted by respondent. (R.O.B. 21.) This misconception, as the Court of Appeals for the Second Circuit explained in *Paszel v. Laird, supra,* is derived from a misreading of the short *per curiam* opinion in *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), Cert. Denied 89 S.Ct. 1301, indulged in by certain district Courts in that circuit. That misconception has been dispelled.

Under the rule urged by petitioner, in addition to presenting a prima facie claim for conscientious objection, the registrant must also allege facts from

---

[3]The 10th Circuit there reads its earlier opinion in *United States v. Maine,* 417 F.2d 951 (10th Cir. 1969) as holding that

> The emergence of beliefs of conscientious objection after an induction order has been issued can constitute "a change in status resulting from circumstances over which the registrant has no control" within the meaning of the quoted regulation. 429 F.2d at 1343,

and not, as respondent asserts, as merely "dictum in related cases." (R.O.B. 16 n. 3.)

which a board may conclude that the registrant neither slept on his rights nor, after his order to report was mailed, deliberately changed his status to achieve an exemption. Should the board find that the registrant has failed to sustain this additional burden, it need not reopen even if the claimant would otherwise clearly be entitled to exemption, and, of course, such a conclusion is unassailable upon judicial review if there exists a basis in fact to support it. *Estep v. United States,* 327 U.S. 114 (1946).[4]

Under the authority of the cases cited above, the teaching of the philosophers, and common experience, petitioner has argued and the dissenters below agreed that conscience is by definition not compellable, that views which may be consciously altered are unworthy of that name, and that the majority below was therefore wrong in presuming the contrary. Further, even where unarguably controllable activities have provided the basis for one's conclusions, e.g., study and inquiry, the conclusions themselves are beyond one's control, insofar as one has fairly permitted the evidence to determine the conclusion. See Aldisert, J., concurring in *Scott v. Volatile,* ..... F.2d ....., ... (3d Cir. 1970) (slip opinion, p. 18). Such a result satisfies both the national policy of protecting conscience and the reasonable requirement that claims for exemption

[4]We do not concede as an abstract proposition that bona fide conscientious objectors may be compelled to choose between military service and prison, based on the time their views mature or are reported, *whenever* this occurs. We are not, however, compelled by the facts and law of this case to argue this perhaps more difficult position, which the legislative intent cited infra at p. 23 would seem to support. And see Petitioner's Opening Brief (hereinafter P.O.B. 17, n. 27).

from military service be promptly asserted. It does not, as respondent suggests, require the Court to take sides in a scholastic dispute.

Local boards were not created to resolve philosophical questions in the abstract, but to deal in concrete cases. Both parties agree that the purpose of the regulation is to relieve the board of the burden of granting the ordinary procedural privileges to merely dilatory claims asserted after a certain cut-off date. The board then must determine whether the claim is dilatory, by determining whether the facts upon which the claim is based existed and were known to exist prior to the cut-off date (culling out those who have slept on their rights), or whether the registrant, learning that induction is imminent, has deliberately created a set of circumstances in a last-minute attempt to forestall induction by achieving a deferred status.

In actual practice, the scope and standards of the inquiry are familiar to local boards. Although the decision is difficult and much rests upon it, the board is not required to determine whether the registrant's statement is, in a philosophical or theological sense, "true",[5] or even whether it is comprehensible. The board is required to determine, from facts submitted by the registrant, whether the registrant's post-mailing claim is based on pre-existing views tardily asserted, or is the result of a conscious effort to acquire views in oppostion of war in any form—in the words

[5]This, contrary to respondent's contention, is the inquiry forbidden to be made under *United States v. Seeger*, 380 U.S. 163 (1965).

of Judge Aldisert, "Opt[ing] for a belief without being 'driven' by the evidence, or in spite of the evidence," *Scott v. Volatile,* slip op. 18—or is, like Ehlert's, a claim which demonstrates the coalescence of previously unformed views into sincere conscientious objection after the notice to report was mailed.

If the board finds the latter set of facts to exist, then, petitioner insists, the board must reopen and reclassify the registrant.

There is no substance to respondent's assertion that the regulation can not apply to late-maturing conscientious objectors and that neither Courts nor local boards can interpret the language and intent of Congress and the President to achieve a sensible result. Even if this proposition were true, it would not follow that the late-maturing conscientious objector must bear the burden of a regulation containing a deadline for asserting his claim without the benefit of the exception to the deadline found in the same regulation.[6] Such an interpretation, we have argued, would be *ultra vires* and void. See P.O.B. 17, n. 27. We shall show that the case law, the legislative history, the language of the regulation and consider-

[6]The Government's position creates loose ends and requires futile acts both of the registrant and of the local board. The registrant must still notify the local board of any change in his status, 32 CFR 1625.1(b), even though, according to the Government, they are foreclosed from acting upon that notice. The board must send the registrant an SSS Form 150, 32 CFR 1261.11, although they cannot act upon it. The registrant must return that form in a fixed number of days, 32 CFR §1606.51(a), SSS Form 150, and yet the board may not act upon it. The statute and the regulations require all these acts by the parties; yet all these acts, if respondent is correct, are sterile, dry and futile.

ations of public policy do not support such an unconscionable result.

1. The Weight of Authority Does Not Compel the Denial of Reopening to the Late Maturing Conscientious Objector.

The Government asserts that acceptance of petitioner's position would have the result of overturning "the weight of judicial . . . precedent which sustains a specific cut-off date for submission of pre-induction conscientious objector claims . . ." (R.O.B. 16.)

Many of the cases referred to by respondent either do not speak to the issue at hand or reason to a different conclusion than that reached by respondent.[7]

The Government has cited seventeen cases in support of its arguments. (R.O.B. 15-16.) In seven of these cases, the registrant's claim was either made before the order to report for induction was mailed, or was based upon a status existing before the order was mailed.[8]

---

[7]It should be kept in mind that all of the earlier cases, like the one at bar, arose under the pre-1967 Act, which required a Justice Department investigation, hearing and report as a consequence of an appeal from the denial of a claim for classification as a conscientious objector by the local board. (June 24, 1948 C. 625, Title I, §6, 62 Stat. 613.) This procedure sometimes created delays of as long as two years, and was amended out of the 1967 Act. Petitioner suggests that this extensive delay as a consequence of reopening may be an unspoken raison d'etre in the holdings of cases cited below.

[8]*United States v. Bartelt*, 200 F.2d 385 (7th Cir. 1952); *Boyd v. United States*, 269 F.2d 607 (9th Cir. 1959); *United States v. Taylor*, 351 F.2d 228 (6th Cir. 1965); *Porter v. United States*, 334 F.2d 792 (7th Cir. 1969); *Parrott v. United States*, 370 F.2d 388 (9th Cir. 1966) cert. denied 387 U.S. 908; *United States v. Kroll*, 400 F.2d 923 (3d Cir. 1968) cert. denied 393 U.S. 1069; *Davis v. United States*, 374 F.2d 1 (5th Cir. 1967).

In three of the cited cases, the registrant either never made a claim for exemption or introduced no facts to support his claim.[9] In these cases, the result would have been the same had the *Gearey* rule been applied.

Leitner v. United States, 222 F.2d 363 (4th Cir. 1955) is simply not in point.

United States v. Jennison, 402 F.2d 51 (6th Cir. 1958), Cert. Denied, 394 U.S. 912, is highly equivocal. The holding of the Court was two-pronged. *Taylor,* n. 8, *supra,* was read as holding that a draft board is not *required* to consider a claim of conscientious objection asserted after notice of induction has been mailed even if a conversion to conscientious objection has matured after mailing of such notice. The court did *not* hold that such reconsideration was barred. Second, the *Jennison* Court held that the claim presented in that case was "not such as to require the Selective Service authorities to find that, in such period, there had occurred a change in his status resulting from circumstances 'over which the registrant had no control.'" 402 F.2d at 52.

The Court said:

> It appears that appellant's beliefs likely had matured prior to receipt of the induction notice . . . 402 F.2d at 54.

---

[9] *Feuer v. United States,* 208 F.2d 719 (9th Cir. 1953); *United States v. Mohammed,* 288 F.2d 236 (7th Cir. 1961) cert. denied 368 U.S. 820; *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968).

Judge McCree, dissenting, felt that the regulation could not stand unless it was interpreted so as not to bar genuine post-notice claims.

Two other cases cited as authority by respondent actually support the position advanced by the petitioner.

In *United States ex rel. Berman v. Craig*, 207 F.2d 888 (3d Cir. 1953), the local board classified the registrant I-A, then mailed an order to report for induction less than 10 days after the date of that classification. Berman's application for ministerial deferment was received after the order to report for induction had been mailed, but within 10 days of the date he learned of his acceptance to a theological seminary. The Court of Appeals reversed his conviction, finding a violation of procedural rights. The Court said:

> Sections 1625.1 and 1625.2 of the Regulations taken together require a local board to consider anew the classification of a registrant who reports, within 10 days after it occurs, a change in his status which may require his reclassification. This it is the board's duty to do even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted. Such a timely report was made . . . by Berman through his telegram of July 3, 1952. . . . The local board should have given consideration to Berman's change of status and determined whether it required his reclassification. 207 F.2d 888, 891.

Thus, as early as 1953, the Third Circuit held that the mailing of an order to report for induction is

not an absolute bar to reopening and reclassification even where the change in status antedates that mailing.

The holding in *Keene v. United States*, 266 F.2d 378 (10th Cir. 1959), is directly contrary to the concurring opinion of Judge Duniway below, upon which respondent relies so heavily, and in fact was relied upon as authority by the Court in *Gearey I, supra.*

In *Keene*, the defendant applied for an exemption as a conscientious objector by letter on the date his order to report for induction (SS Form 252) was mailed to him by his local board. The Board made a specific finding of no new change in status due to circumstances beyond his control. The Court there found that the defendant had entertained the beliefs that he claimed exempted him from service for at least three months prior to the order to report for induction; hence, there was no change in status after the induction notice was mailed. As to the applicability of the regulation, the Court said:

> *We think the Regulations have application to a conscientious objector's claim as all other claims for a change in status* . . . Our question then is narrowed to whether the appellant is entitled to have his classification reopened and considered anew on the grounds of a change of status due to circumstances beyond his control. This is to say, a change of status due to a change of conscience occurring after the notice to report was mailed. *If such change did occur, the board erroneously refused to reopen and review,* and an appeal lies therefrom by force of the statute, although no provision in the Regulations is made therefor. 266 F.2d 378, 384. (Emphasis added.)

The cases upon which respondent relies which do in fact support respondent's position in turn rely on *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953). Not only was the issue as there presented not thoroughly briefed and argued by counsel, since it appears that it was first raised at oral argument on appeal, but the decision rendered by that Court was devoid of any reasoning, logic or authority to support its conclusion that conscientious objector beliefs which mature after the mailing of an order to report for induction fall outside of the contemplated scope of the Regulation. The Court there merely said:

> On oral argument before this court, defendant's counsel suggested that conscientious objections resulting from the promptings of a registrant's conscience would be a change in status over which the registrant had no control. We cannot acquiesce in such a strained interpretation of the regulation. There was no other claim of a change in status. The Board did not find any change in defendant's status, and therefore in failing to reopen defendant's classification it did not exceed its powers or act in an arbitrary manner. 201 F.2d at 32.

The balance of respondent's authority rests upon this insecure foundation. *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967) Cert. Denied 390 U.S. 958, relies solely upon *United States v. Al-Majied Mohammad,* 364 F.2d 223 (4th Cir. 1966). That case rested its opinion upon *Schoebel, supra,* and upon *Porter v. United States,* 334 F.2d 792 (7th Cir. 1964). *Porter,* in turn, relied upon *Schoebel* (although, as indicated earlier at n 8, Porter's change of status antedated

his order to report), and, as we have shown, the *Schoebel* "holding" is almost an afterthought, unsupported by analysis or authority.

2. Construction of the Regulation.

(a) Legislative history and administrative authority.

The Government theorizes that all post-mailing claims are barred except in "the unusual emergency situation where an unforeseeable event, such as a death in the family, may give rise to a belated claim of deferment . . . or exemption," (R.O.B. 14-15), and therefore concludes that hardship, dependency, and sole-surviving son claimants may be heard, while late-maturing conscientious objectors may not. The Government cites nothing to support this conclusion, which is in fact directly contrary to the express intent of Congress.

The congressional debates surrounding the passage of Senate Bill 1432, which became the Military Selective Service Act of 1967, indicate no such intent to discriminate against conscientious objectors.

In the House of Representatives, in a summary of the provisions of the House Committee version of S. 1432, we find the following:

> Mr. Smith of California: Registrants claiming conscientious objection will therefore be afforded the same appeal procedures and administrative remedies that are available to all other registrants. 113 Cong. Rec., May 25, 1967, 14094.

Representative L. Mendel Rivers, the Chairman of the House Committee on Armed Services, spoke in almost identical terminology:

> Registrants claiming conscientious objection will therefore be accorded the same appeal procedures and administrative remedies that are available to all other registrants. Id., 14097-98.

Thus, it is clear that Congress intended conscientious objector claimants to have identical rights of reopening and reclassification as hardship claimants, sole-surviving son claimants, or any other claimant. As for administrative precedent (R.O.B. 16), the Government cites no authority, nor does it question that the state directors of at least two states have provided detailed guidelines for processing post-notice claims of induction for conscientious objector status. (P.O.B. 28, n. 53.)

(b) The plain language of the regulation.

Respondent, in accord with Judge Duniway below, theorizes that "what the draftsmen of the regulations contemplated . . . was simply the occurrence of some objectively identifiable extraneous event or circumstance . . . and not some element of the registrant's internal thought processes." (R.O.B. 23-24.)

Such an intent is not clear. No authority beyond respondent's own reading of the language of the regulation is cited to show such an intent, save the concurring opinion of Judge Duniway below. The argument of that learned Judge was that "circumstances" must mean circumstances *external* to the registrant, and since conscience is an internal change, the regulation cannot apply. The basis for that opinion was a particular reading of the words of the

regulation. Respondent suggests this reading is erroneous, and that an alternative reading is correct and just. Perhaps it is the Latin origins of the word "circumstances"—"standing around"—that leads to the image of events outside the registrant somehow being required by the regulation. But the regulation does *not* read "a change in the *registrant* resulting from circumstances beyond his control," it reads "a change in the registrant's *status* resulting from circumstances beyond his control." Thus, the regulation does not require some external act or event "standing around" the *registrant;* it requires some act or event external to the registrant's *status.*

The registrant's status in this context can only mean his *draft* status, and, in the case at bar, the only relevant change in that status is the change in the registrant's views from a position where military service does not violate conscientiously held beliefs to a position where such service has become morally impossible.[10]

There is no specific language in the regulation which states that claims of conscientious objection shall categorically be barred after an order to report is mailed. This is not surprising, in view of the legislative history previously cited. But certainly had the President intended the regulation to bar these claims, such an exclusion would have been carefully spelled out, in view of the nature of such claims and the long-standing tradition of affording them protec-

[10]See the rebuttal of Judge Duniway's argument by Merrill, J., dissenting below at A. 44.

tion. See *United States v. Underwood*, 151 F.Supp. 874, 876 (E.D. Pa. 1955).

The Government argues that there is no discrimination against conscientious objectors, because claims of a change to student or occupational status are also foreclosed by the regulation. But it is not possible that one may enroll in a school[11] nor is it likely that one's occupation could become necessary to the national interest[12] through circumstances beyond one's control.

The regulation may properly be applied to prevent a registrant from gaining a reopening and reclassification by unarguably volitional acts.

Further, no reason is advanced for the Government's proposition that it is proper to make an exception for belated claimants for deferment on grounds of extreme hardship and not for belated conscientious objector claimants. Army Regulation 635-200 provides a forum and a remedy for in-service hardship claimants; the inquiry may be more complex and time-consuming in the hardship case than in the conscientious objection case, and, perhaps most important, the military forum is at least *accessible* to the hardship claimant, whose conscience does not compel him to refuse to submit to induction.

---

[11]But see *United States ex rel. Berman v. Craig*, 207 F.2d 888, 890 (3d Cir. 1953).

[12]Normally, at least, this is true, but suppose that, prior to April 23, 1970 when occupational deferments were abandoned, an accident in a defense plant incapacitated all but one engineer on a team of engineers doing critical defense research. The services of that survivor may have become necessary to the maintenance of the national health, safety or interest within the meaning of 32 CFR 1622.22, through circumstances beyond his control.

(c) There are no policy considerations of sufficient weight to justify denying the late-maturing conscientious objector the right to a reopening after mailing of an order to report for induction.

The Government argues that the purpose of 32 CFR §1625.2 is to prevent dilatory claims from disrupting the operation of the Selective Service System. Further, the Government insists that to recognize such claims is unfair to other registrants, whose induction would thereby be accelerated, and who might be drafted where "in the normal course of events, [they] would not have been reached". (R.O.B. 14, n. 6.) These factors are referred to by the Government as "overriding policy considerations". (R.O.B. 14.)

We agree with respondent as to the purpose of the regulation. However, a true late-maturing conscientious objection claim is *not* "dilatory"—that is, either made for delay or made after the registrant has slept on his rights. Here petitioner's claim for exemption as a conscientious objector was made promptly upon the maturation of the views it communicated to the board. To insist, as the Government does, that Ehlert's claim should have been submitted before his conscientious objection was fully mature, is both absurd and an invitation to make false statements with respect to his Selective Service classification, a violation of law.[13]

In response to the unsupported assertion that granting a few conscientious objector claimants the right to have their claims heard will plunge the

[13] 50 U.S.C. App. §462(a).

Selective Service System into chaos, petitioner has discussed at length in his opening brief how postponements and delays in inductions are quite routinely granted in numerous other cases without any apparent disturbance in the orderly satisfaction of military manpower requirements. (P.O.B. 27-29.)

Nor, in any given case, is the burden of dealing with a conscientious objection claim significantly greater than that encountered in resolving other routinely-handled claims. The material before the board in deciding a conscientious objection claim is generally the registrant's completed Form SSS 150 (Special Form for Conscientious Objectors) (See A 54) and whatever supporting letters he himself can muster. On the other hand, the inquiry necessary to determine an extreme hardship claim, 32 C.F.R. §1622.22, especially if that claim involves emotional hardship, may call for inquiries about his financial situation, his family life, the emotional and physical health of his dependents, a projection of the impact of his induction upon these elements, and finally a decision based upon these objective and subjective factors which may be much more difficult to make than that required in the conscientious objection situation.

The impact upon military manpower of the brief delay which a reopening might require is, of course, nil, as the services of the sincere conscientious objector claimant will be denied to the armed forces in any case. See *United States v. Freeman,* 388 F.2d 246. (7 Cir. 1967).

The government asserts that to recognize late-maturing conscientious objection claims is unfair to other registrants, whose induction is accelerated and who might be drafted where "in the normal course of events, [they] would not have been reached." (R.O.B. 14, n. 6.) This only begs the question as to what the so-called "normal course" is and should be. It is only unfair to other registrants to hear such claims if the necessary postponement or cancellation of the imminent induction order is unlawful. If the government is arguing that to grant exemption from service to those conscientiously opposed to participation in war in any form is unfair to others, its remedy is to seek the repeal of 50 U.S.C. App. 456(j).

In sum, the government's contentions do not advance any legitimate purpose, and lead to the following results: No relief to other registrants, some slight relief to the local board, and no relief to the military who, the government later insists, should itself shoulder the burden of hearing such claims.

Compare these ephemeral benefits with the other results of the government's interpretation: In the face of a time-honored tradition of protection of the conscience of the individual more ancient than the Republic itself, and in the face of an Act of Congress which provides that "nothing contained in this Title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," 50 U.S.C. App. 456(j), sincere conscientious objectors of peti-

tioner's class are denied even a hearing on their claims for exemption.[14]

3. The Government's Interpretation of the Regulation Creates a Class of Conscientious Objectors Who Are Denied a Forum to Assert Their Claims.

We have shown that the regulation as construed below creates a "no-man's land" for that class of conscientious objector claimants whose views mature between the date that an order to report for induction is mailed and the date set for induction. (P.O.B. 21.) The Government dismisses this argument by asserting that "[the claim] can be considered by the military immediately upon induction." (R.O.B. 25.) However, petitioner is not merely a claimant seeking a forum; he is a man who is conscientiously opposed to participation in war, to the extent that it is morally impossible for him to submit to induction into the Armed Forces.

The Government's position creates the paradox whereby a claimant for conscientious objector status must submit to induction in order to assert that it is impossible for him to submit to induction!

We reaffirm that the regulation as interpreted below bars Ehlert from any forum, either Selective Service

---

[14]The government argues that there is no absolute statutory right to exemption because §456(j) only applies when the claim "is sustained by the local board."

Even assuming *arguendo* that conscientious objectors only have a statutory right to exemption after the board grants them a conscientious objector classification, the language of the statute fairly implies a right at the very least to an opportunity to raise a claim and have a decision upon the merits without having first to submit to induction, upon which no regulation may infringe.

Respondent argues for a rule which prevents the local board from examining the claim, much less sustaining it.

or military, and is thus unconstitutionally discriminatory, contrary to national policy and contrary to the mandate of Congress.

In two categories of cases, registrants who had submitted claims for exemption as conscientious objector prior to induction have been granted habeas corpus relief by the Courts after the military has denied their subsequent applications for discharge as conscientious objectors pursuant to Department of Defense Directive (hereinafter DoD) 1300.6.

The first category consists of those cases where the Courts have found that the later in-service claim was somehow different from the claim earlier denied by Selective Service, and thus not barred by Army Regulation 635-20 Para. 3b(2).[15] *United States ex rel. Healy v. Beatty,* 424 F.2d 299 (5th Cir. 1970); *United States ex rel. Barr v. Resor,* 309 F.Supp. 917 (D.D.C. 1969); *Aquilino v. Laird,* 316 F.Supp. 1053 (W.D. Texas, 1970) [on remand from the Fifth Circuit, 429 F.2d 573 (5th Cir. 1970)]. And see *Goodwin v. Laird,* No. C-70-808 (N.D. Cal., June 19, 1970), 3 Sel.Serv.L. Rep. 3151.

---

[15]AR 635-20, 22 January 1969

Requests for discharge after entering military service will not be accepted when . . .

(2) Based solely on conscientious objection which existed, but was not claimed prior to induction . . .

This regulation was amended on 31 July 1970 (effective 15 August 1970) to read:

Requests for discharge after entering military service will not be *favorably considered* when . . .

(2) Based solely on conscientious objection which existed, but was not claimed prior to *notice of* induction . . . (changes emphasized).

As we shall show, this change affords no relief to the conscientious objector who cannot submit to induction.

The second category is similar to the case at bar and consists of cases where the pre-induction claim was made but not decided on the merits. *Baker v. Laird,* 316 F.Supp. 1 (1970) [special form for conscientious objectors requested prior to mailing of induction order but received afterward; Board refused to reopen under 32 C.F.R. §1625.2]; *Peterson v. Laird,* No. C-70-807 (N.D. Cal., August 12, 1970), 3 Sel.Serv.L.Rep. 3120 [misadvice by local board, refusal to supply special form for conscientious objectors].

In *Baker* the petitioner submitted a completed request for classification as a conscientious objector after an order to report for induction had been mailed. The local board refused to reopen, and Baker submitted to induction. After Basic and Advanced Training, Baker applied for a conscientious objector discharge, which was denied. In granting habeas corpus, the district Court held: (1) Baker's views had strengthened and changed during his service period, hence his in-service claim was not "based *solely* on conscientious objection claimed and denied by the Selective Service System prior to induction," [emphasis added] and (2) Baker's claim, while made before induction, was not denied on the merits, but on procedural grounds, hence his in-service claim was not barred by AR 635-20, ¶3B(2).[16]

[16]We discuss only the Army regulations implementing DoD 1300.6, because the relevant cases involve soldiers, the other service regulations are very similar, and the vast majority of draftees are inducted into the Army.

The Court said:

> "The crystallization requirement of Army Regulation 635-20 is not intended to deny sincere conscientious objectors an opportunity to have their claims considered, but only to designate the proper forum in which their claims should be brought. See *Milton v. Commanding General,* ___ F.Supp. ___ [No. C-70-368] (N.D. Cal. 1970). Such a principle of forum apportionment guarantees to the applicant at least one fair chance to have his conscientious objector claim considered. The Government contends that for Baker's in-service application to be entertained would be giving him a second bite at the legal apple, but the facts of the present case are such that to accept the Government's position would be to afford Baker little more than a brush across the mouth of that cherished fruit. Crystallization is undeniably a subtle and ephemeral process which should not be interpreted in such a way as to deny relief to a sincere conscientious objector. *Goodwin v. Laird,* ..... F.Supp. ..... [3 Sel.Serv. L.Rep. 3151] (N.D. Cal., 1970)." 361 F.Supp. at 5.

While this holding, if generally followed,[17] will ameliorate the "no-man's land" effect for late-matur-

---

[17]Note that the Army denied Baker's claim, and the Government vigorously defended their action in doing so, in the face of respondent's assertion that ". . . nor to our knowledge has the Directive ever been so applied." (R.O.B. 26.)

As William P. Thompson, the representative of the National Council of Churches, pointed out during the Senate hearings on the 1967 Act,

> "It is our impression that the administrative provisions of Directive No. 1300.6 are discretionary with the Armed Services, and that recently this discretion has been exercised in ways that seemed arbitrary and unnecessarily harsh." Senate Committee on Armed Services, Hearings on S. 1432, 379 (1967).

ing claims submitted by registrants who can conscientiously submit to induction, it does *not* fulfill the guarantee of "at least one fair chance to have his claim considered" to the registrant who, like Ehlert, cannot in conscience submit to induction. To stretch the *Baker* metaphor, it places the legal apple in a tree which the registrant cannot, in conscience, climb.

Nor did Congress intend that persons whose conscientious objection matured before induction should be required to submit to induction in order to have their claims heard.

In the majority report of the House Committee on Armed Services on the bill which became the Military Selective Service Act of 1967,[18] a result, identical to that which the Government here suggests, was proposed by an amendment requiring all conscientious objectors to submit to induction and to noncombatant service. There was serious objection on the floor of the House:

> Mr. Kastenmeier: The Committee bill, as reported, would return to the World War I practice of inducting conscientious objectors into the armed forces and be required to perform noncombatant duties. This procedure in World War I created many difficulties, court martials, long imprisonments, and even death sentences, though no executions were carried out. Cong. Rec., May 25, 1967, 14119.
>
> Mr. Reuss: Requiring the actual induction of conscientious objectors goes directly counter to the valid principles of conscientious objection. I

[18] 50 U.S.C.App. §§451, et seq., June 30, 1967, Pub.L. 90-40, §1(1), 81 Stat. 100.

> hope this change in the new law will be rejected. *Id.*, 14131.

This proviso was unanimously amended out on motion of Representative L. Mendel Rivers, Chairman of the House Armed Service Committee. *Id.*, 14141.

As Representative Schwerber said:

> It cannot be emphasized too strongly that for the great body of religious objectors the objection is not merely to war and killing, but to induction in the armed forces, and to service under the military arms of the government . . . [citing the Mennonites]. The tragic result of not accepting the amendment now offered could well be the imprisonment of thousands of religious objectors sincerely desiring to be loyal to their Nation but unable to violate their higher loyalty to that which they believe God requires of them . . . *Ibid.*

Nor would requiring late-maturing conscientious objectors to have their claims heard by the military make any sense in terms of forum apportionment. Congress has placed upon the Selective Service System the fundamental responsibility of making findings and sustaining or not sustaining claims of conscientious objection. The local board is required to be composed of members residing in the county of its jurisdiction, 50 U.S.C.App. §460(b)(3), and hence presumably having some opportunity for acquaintance with the registrant and whomever he may request to support his claim.[19] It is their sole function to select

[19]This is, at least, the position of the Government. See *United States v. Weller*, No. 77 this Term, Brief for the United States, 30. But see Brief for appellee in that case, 45.

and supply to the military certain numbers of fit and willing men for training and service.

For the Army, on the other hand, to process conscientious objectors is a serious burden and a distraction from their fundamental mission. As this Court has said in another forum-allocation context:

> Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. *O'Callahan v. Parker,* 395 U.S. 258, 262 (1969).

B. EHLERT'S CLAIM ENTITLED HIM TO A REOPENING AND A RECLASSIFICATION

Under the rule urged by petitioner, he is entitled to a re-opening and re-classification if the local board finds that the applicant's briefs ripened only after his order to report for induction was mailed and that his beliefs qualify him for classification as a conscientious objector. Two basic principles apply to this rule: The claimant bears the burden of showing the above facts to be true, and the local board's decision is conclusive on review if there exists a basis in fact to support it.

What was the decision of the local board in this case? The Board decided not to re-open because the "claim was not a change in [Ehlert's] status which

was beyond [his] control." A 61. The Board did not dispute, or, apparently, ever reach the genuineness of Ehlert's claim, nor did they make a finding as to when his views matured. Thus, we do not know whether the Board decided that Ehlert's views preexisted the order to report or whether they felt his views were not sincerely held, or whether they erroneously decided his views were insufficiently "religious." *Welsh v. United States,* 398 U.S. 339 (1970).

A number of recent cases have held that the local board's failure to state any reason for denying a registrant's prima facie claim for exemption vitiates the legality of a subsequent order to report for induction. *Scott v. Volatile, supra; United States v. Broyles,* 423 F.2d 1299 (4th Cir. 1970) (en banc); *Capobianco v. Laird,* 424 F.2d 1304 (2d Cir. 1970), pet. for cert. pending (1970); *Paszel v. Laird, supra; United States v. Abbott,* 425 F.2d 910 (8th Cir. 1970); *United States v. Haughton,* 413 F.2d 736 (9th Cir. 1969).

The reasoning is significant in the present context:

> In any case where the board fails to disclose the basis for its decision, we risk blind endorsement of a mistake of law. *United States v. Broyles,* 423 F.2d at 1304.

Thus, behind the mask of a refusal to reopen couched in the naked words of the regulation, arbitrariness, error of law or malice may lurk. Searching the registrant's claim with a fine glass for some speck of basis-in-fact will not reveal the unstated reasons for the denial of that claim.

Ehlert's claim, on its face, alleges facts which clearly indicate that he is conscientiously opposed to participation in war in any form, and that such views matured after the order to report for induction was mailed. A 51, 54-57. This was the finding of the trial judge who had the opportunity of hearing Ehlert examined and cross-examined under oath, and to satisfy himself by questions from the bench. Even without the benefit of Ehlert's demeanor on the stand to aid them, eleven of the thirteen judges of the Court below also found that Ehlert presented a *prima facie* case and that his views matured after the order to report for induction was mailed. (P.O.B. 26.) Thus, there is no substance to the respondent's argument that the local board's refusal to re-open was warranted.

The Board could not have found that Ehlert did not make a prima facie case. The Government seeks to support such a finding by stressing the phrases "today" and "at this time" in the text of Ehlert's claim. (R.O.B. 37.) To apply the principles of baroque pleading to the claim of a conscientious objector, thereby finding a negative pregnant with the implication that the claimant thus enthusiastically approves of wars past and future is, we think, grotesque.

Nor can Ehlert's reply to the question, "[U]nder what circumstances, if any, do you believe in the use of force?" provide a basis in fact for denying his claim. He replied, "Under any circumstances in which the use of force would not make more probable the destruction of the human race." A. 55. This Court

may notice that since August 6, 1945, any war anywhere makes more probable the destruction of the human race. It is opposition to war which is of the essence of a conscientious objection claim, not opposition to the use of force in any form—the law does not require petitioner to abhor the findings of Sir Isaac Newton.

The Government also seeks to show petitioner's objection to a "nuclear orgasm which would be totally destructive of human life and values" rests solely upon considerations of policy R.O.B. 37. But Ehlert's statement that "I consider that my duty not to work for the destruction of the human race is superior to any duties which may arise from any human relation." A. 54, is not contradicted anywhere in the record. The objection is clearly based on moral and ethical grounds, upon a duty superior to that arising from any human relation. *United States v. Seeger,* 380 U.S. 163 (1965); *Welsh v. United States,* 398 U.S. 339 (1970). A conscientious objector is not required, in addition, to believe that the total destruction of the human race is somehow politic.

Further, Ehlert's claim that his views matured after the order to report for induction was mailed is uncontradicted. Of course, as Ehlert frankly stated (A 51) his views had antecedents. A lightning transformation from fascist warmonger to total pacifist is not required. *Scott v. Volatile, supra,* Slip Opinion 6.

CONCLUSIONS

For the foregoing reasons, the judgment of conviction should be REVERSED.

Dated, December 14, 1970.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
MARVIN M. KARPATKIN,
ACLU Foundation,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN & LIPPETT,
By STANLEY J. FRIEDMAN,
*Attorneys for Petitioner.**

*Attorneys for petitioner gratefully acknowledge the assistance of Arthur Wells, Jr., Esq., who ably represented appellant before the Court of Appeals, Robert Regli, Esq., and David Reid Gilson, Esq.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, PETITIONER

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

1. At the request of the Court during oral argument of this case on January 13, 1971, there are attached hereto, as Appendix A, figures compiled by the Selective Service System which relate to the number of post-induction notice conscientious objector claims filed in ten jurisdictions in the United States over a four-month period from August through November, 1970.

2. The Court also requested that the government furnish some evidence to verify the assertion made by government counsel during oral argument that the Department of the Army is now, and in the past has been, interpreting Department of Defense Directive No. 1300.6 in the manner indicated in our merits brief

414-433—71——1

in this case (Gov't Br., pp. 24–26).[1] A letter has been obtained from the General Counsel of the Department of the Army verifying this fact, and a copy is attached hereto as Appendix B.

3. Finally, this Court requested the government to provide some explanation of the procedures followed by the Armed Forces in processing conscientious objector claims raised after induction. Those procedures are spelled out fully in paragraph VI of Department of Defense Directive No. 1300.6, attached hereto as Appendix C.[2]

This directive provides expressly that throughout the period during which a conscientious objector claim is being processed by the military, the applicant making the claim will be employed "only in duties which involve the minimum practicable conflict with the asserted beliefs" (App. C, p. 13, *infra*).

When an application for conscientious objector

---

[1] Two recent district court decisions (*Baker* v. *Laird*, 316 F. Supp. 1 (N.D. Calif.) and *Morrison* v. *Larsen*, N.D. Calif., Civ. No. 70–858–ACW, decided September 16, 1970, pending on appeal, C.A. 9, No. 26869) erroneously suggest that the Army is not following this interpretation. However, an examination of the claims in those cases reveals that they were not based on beliefs which matured after induction, or even after notice of induction; rather the conscientious objector beliefs matured prior to notice of induction but were not asserted until after mailing of the notice. Thus, the Army's denial of those claims under AR 635–20, para. 3(b)(1) (App. D, p. 26, *infra*) was not contrary to, but entirely consistent with, its interpretation of the directive since 1965, as expressed in Appendix B hereto.

[2] The implementing regulation for the Department of the Army (AR 635–20)—referred to in the letter from General Counsel for the Department of the Army (App. B, p. 6, *infra*)—is attached hereto as Appendix D.

status is filed, the directive provides that the applicant is to be interviewed separately by a chaplain and a psychiatrist (or medical officer) and each is to prepare a written report on the interview. The applicant is also afforded an opportunity to appear before an officer "who is knowledgeable in policies and procedures relating to conscientious objector methods" (App. C, p. 14, *infra*) to be heard in support of his application. A written report is also prepared covering this appearance. All reports are then forwarded, together with the application and any supporting documents, "to Departmental headquarters for individual determination of action on the basis of the facts and special circumstances of the case" (App. C, pp. 14–15, *infra*). The final decision is made by the Military Conscientious Objector Review Board, comprised of four members: a senior officer who is the Review Board president, an officer in the Judge Advocate General Corps, a chaplain, and a Medical Corps officer (App. B, p. 7, *infra*).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

APPENDIX A

Ten jurisdictions with highest percentages of post-induction notice conscientious-objector claims (excluding Puerto Rico) for August–November, 1970

	Post-Notice Claims	Draft Calls	Percent
District of Columbia	17	113	15.0
New York	391	3,086	12.6
California	496	4,191	[1] 11.7
Oregon	43	373	11.5
Massachusetts	88	775	11.3
Washington	60	539	11.1
Connecticut	55	525	10.5
Rhode Island	11	122	9.0
Colorado	42	471	8.9
Michigan	107	1,964	8.5
Total	1,364	12,189	11.22

[1] During oral argument, petitioner's counsel cited the relatively high California rate of post-notice claims as evidence that even the adoption of the *Ehlert* rule by this Court would not deter the filing of such claims, since California registrants during this period of time were governed by the Ninth Circuit ruling in *Ehlert*. However, certiorari was granted by this Court in *Ehlert* on May 4, 1970, 397 U.S. 1074, and thus it can scarcely be supposed that draft counsellors, whether in the Ninth Circuit or elsewhere, thought of the question as a closed one during the months that the case has been pending for decision in this Court.

National summary

	1970			
	August	September	October	November
Conscientious-Objector Claims Made Subsequent to Induction Notice	987	655	549	534
Monthly Draft Calls	10,000	12,000	12,000	8,000
Percent	9.87	5.46	4.58	6.85

Totals for August–November, 1970

Post-Notice Claims	2,606
Draft Calls	42,000
Percent	6.42

APPENDIX B

DEPARTMENT OF THE ARMY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., January 15, 1971.

Mr. WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel,
Department of Justice,
Washington, D.C. 20530

DEAR MR. REHNQUIST: You asked me to explain the nature and duties of the Department of the Army 1–O Conscientious Objector Review Board.

As you know, Army Regulation 635–20 provides that the entire file of the conscientious objector applicant, including the application form with all enclosures, reports of interview, the recommendation of the hearing officer, and the Department of Defense Summary Sheet for Review of Conscientious Objector Application, will be forwarded to the Adjutant General by the officer exercising general court-martial jurisdiction over the applicant. Although not mentioned in the regulation, upon receipt of the file, the Adjutant General reviews the file to ensure that all the necessary papers are enclosed and then forwards it to the Department of the Army 1–O Conscientious Objector Review Board.

The 1–O Conscientious Objector Review Board has been delegated the authority by the Deputy Chief of Staff for Personnel on behalf of the Secretary of the Army to render a final decision on the applicant's request for discharge on conscientious objector grounds.

The Board itself is comprised of four members; only three need be present to constitute a quorum for voting purposes. The president of the board is a senior officer who has the ministerial responsibility of scheduling and calling for votes on a particular case. The additional members include an officer in the Judge Advocate General Corps, a chaplain, and a Medical Corps officer.

Each member sitting on the particular case will be provided a copy of the file for his review and study. After appropriate study of the file, the members of the Board will, at a meeting of all members sitting on the case, vote to grant or deny discharge to the applicant in light of the facts of the particular case and according to the types of conscientious objector claims which are recognized under AR 635–20. Where the applicant receives a majority vote in his favor, or where there is a tie vote, his request for discharge as a conscientious objector will be approved. A written decision is prepared by the Board which is then sent back to the Adjutant General, who then informs the applicant of the decision through the appropriate chain of command.

You also asked whether the Army allows a soldier to file for discharge in instances where his conscientious objector views are fixed after notice of induction but prior to entry into the military service. Present practice grants the soldier the opportunity to file in such cases. Department of the Army military and civilian personnel who worked in this field in 1965 indicate that the Army also followed this practice in 1965.

I hope that this information serves your needs.

Sincerely,

ROBERT E. JORDAN, III,
General Counsel.

APPENDIX C

Department of Defense Directive

Subject: Conscientious Objectors.

Ref.: (a) DoD Directive 1300.6, subject as above, August 21, 1962 (hereby cancelled).
(b) DoD Directive 1332.14, "Administrative Discharges," December 20, 1965.
(c) Section 6(j) of Title I of Public Law 90-40, June 30, 1967, "Military Selective Service Act of 1967" (herein referred to as "MSSAct").
(d) Section 3103, Title 38, United States Code.

I. REISSUANCE AND PURPOSE

This Directive reissues reference (a) to update uniform Department of Defense procedures governing conscientious objectors and processing requests for discharge based on conscientious objection. Reference (a) is hereby superseded and cancelled.

II. APPLICABILITY AND SCOPE

The provisions of this Directive apply to the Military Departments and govern personnel of the Army, Navy, Air Force, and Marine Corps and all Reserve components thereof.

III. DEFINITIONS

A. *Non-combatant service or non-combatant duties (used interchangeably herein).*—

1. service in any unit of the Armed Forces which is unarmed at all times;

2. service in the medical department of any of the Armed Forces, wherever performed; or

3. any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

B. *Non-combatant training.*—Any training which is not concerned with the study, use, or handling of arms or weapons.

IV. POLICY

A. *National Policy.*—The fact of conscientious objection does not exempt men from the draft. However, the Congress, as indicated by provisions of P.L. 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (1-0 classification) shall not be inducted into the Armed Forces but will be required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a civilian work program administered by Selective Service.

B. *DoD Policy.*—Consistent with this national policy, bona fide conscientious objection as set forth in this Directive by persons who are members of the

Armed Forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized. This policy will be executed subject to the following:

1. No vested right exists for any person to be discharged from military Service at his own request even for conscientious objection before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of an obligated term of service is discretionary with the military Service concerned, based on judgment of the facts and circumstances in the case.

2. A request for discharge after entering military Service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military Service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

3. A request for discharge or assignment to noncombatant duties on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the Departmental headquarters of the person's service in accordance with the facts and circumstances in the particular case and the criteria outlined in section V., below. The type of

discharge, if separation is deemed warranted, will be determined by the person's military record; the standards set forth in DoD Directive 1332.14 (reference (b)); and the procedural guidelines outlined in VI., below.

a. In evaluating requests for discharge based on conscientious objection, great care must be exercised to assure the sincerity of the claim; in addition, care shall be taken to assure that clear and concise discharge procedures are issued in compliance with section VII., below, to preclude inviting or permitting abuse by unscrupulous persons who may seek to avoid all obligations on the grounds of moral, ethical, or religious beliefs.

b. Since it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining 1-O or 1-A-O[1] classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service.

c. Persons inducted into military service under 1-A-O Selective Service classification will be assigned to non-combatant service.

d. When persons inducted into military service claim to be conscientious objectors and state they were so classified by the SSS, but their records do not so

[1] 1-A-O classification permits induction into the military Service and the inductee is required to perform duties as outlined in section III and VI.D of this Directive; 1-O classification does not permit induction into military service but does permit induction into a civilian work program administered by Selective Service. In either of the classifications the registrant is required to fulfill his obligation under the MSS Act (reference (e)).

indicate, or claim they were erroneously denied SSS classification as a conscientious objector, or state they were denied a procedural right in their classification by the SSS, the Military Department concerned will immediately communicate with the National Headquarters, Selective Service System, Washington, D.C. 20435 to ascertain the facts of the matter as outlined in VI.A., below. Pending completion of that inquiry and disposition of the matter the person should be employed in duties which involve the minimum practicable conflict with his asserted beliefs, as outlined in VI.A., below.

V. CRITERIA

A. Section 6(j) of Title I of the MSS Act (reference (c)) provides an exemption from combatant training and service in the Armed Forces of the United States for any person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." The same subsection further provides that " 'religious training and belief' does not include essentially political, sociological, or philosophical views or a merely personal moral code."

B. However, in a recent interpretation of Section 6(j) the Supreme Court ruled that the law "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." The Court further ruled that conscientious objector classification cannot be claimed by those "whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical or religious principle but instead solely upon considerations

of policy, pragmatism or expediency." The objection must be to all wars at all times and not to a particular war.

VI. PROCEDURES

A. With respect to those persons inducted into military Service who claim to be conscientious objectors and state that they were so classified by their local board, but their records do not so indicate, representatives of the Military Department concerned will take the following actions:

1. Employ the person only in duties which involve the minimum practicable conflict with his asserted beliefs pending investigation and decision on the case.

2. Obtain a statement from the person concerned and refer the case to the Departmental headquarters of the person's Service for investigation through the Selective Service System and decision.

3. When it is determined that the person should have been classified as 1–O or 1–A–O, but inadvertently was not so classified, the records will be corrected and the Commanding Officer will be directed to correct his records accordingly. The person then will be processed as indicated in subsection C. or D., below, as appropriate.

4. When it is determined that no change in classification is warranted, the person will be notified to this effect.

B. With respect to persons who have already served a portion of their obligated service who request discharge or non-combatant service for conscientious objection, the following actions will be taken;

1. The person will submit an application including the information required in Enclosure 1 and such other documentation of his case as is deemed appropriate by the Military Departments concerned.

2. Pending decision on the case and to the extent practicable the person will be employed in duties which involve the minimum conflict with his asserted beliefs. This paragraph shall not be applicable where repeat applications are filed by an individual based upon substantially the same supporting information.

3. The person will be fully advised and counselled concerning the provisions of Section 3103, Title 38, United States Code (reference (d)).[2] After counselling, the person will be required to sign and date the statement appended here to as Enclosure 2.

4. The applicant will be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of O–3, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters.

a. After permitting the applicant to be heard in support of his application and making such other inquiry into the merits of the application as he considers appropriate, that officer will enter his recommendation and the reasons therefor into the file.

b. If the applicant waives the opportunity to be heard, his waiver will be obtained in writing and made a part of the file.

5. The application and supporting papers will be forwarded together with any other pertinent information known to the immediate command, to Depart-

[2] 38 U.S.C. 3103 provides, in pertinent part, that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such persons under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane.

mental headquarters for individual determination of action on the basis of the facts and the special circumstances of the case.

6. Prior to making disposition of the application the Military Department concerned will determine, in accordance with the terms of subparagraph IV.B.3.c., above, whether to forward the case to the Director, Selective Service System, Washington, D.C. 20435, for an advisory opinion.

7. When it is determined that an advisory opinion will not be requested from Selective Service, the Military Department concerned will make a determination on the merits of the application and will then take appropriate action as indicated in C., below.

8. In each case, the Military Department concerned will:

a. include the recommendations and reasons therefor of the officer before whom the applicant appeared in accordance with VI.B.4., above, in support of his application;

b. include a statement and report of a chaplain based upon an interview with the applicant, to include comments on the sincerity of the applicant in his belief and an opinion as to the source of the belief;

c. include a statement by a psychiatrist, or by a medical officer when a psychiatrist is not available, based upon an interview with the applicant;

d. review the application to insure that all information required by Enclosure 1 has been provided by the applicant; and

e. complete DD Form 1589, 1 February, 1967, "Summary Sheet for Review of Conscientious Objector Application," copy attached as Enclosure 4.

C. When a determination has been made on the merits of the application, the following actions will be taken:

1. Persons determined by a Military Department (whether or not such a determination was based on a recommendation by the Selective Service System) to meet the criteria for 1–O classification will normally be discharged "For the convenience of the Government."

a. Conscientious objection will be specifically cited in the discharge document as the supporting reason when that is the sole reason for discharge, to avoid possible future confusion.

b. Pending separation, the person will continue to be assigned duties providing the minimum practicable conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.

2. Persons (volunteers and inductees) with less than one hundred and eighty (180) days' service who are determined to be bona fide conscientious objectors (1–O classification) and whose request for separation is made early enough so that discharge will occur prior to completion of one hundred and eighty (180) days' active duty will be separated (for the convenience of the Government by reason of conscientious objection) early enough to permit the remaining service in the civilian work program administered by Selective Service. In such cases, the Selective Service System will be promptly notified of the date of discharge from the military Service, the fact that the individual has not completed one hundred eighty (180) days' active duty, and will be requested to induct the individuals for the alternate service provided by the MSS Act (reference (c)).

3. Persons for whom 1–A–O classification is recommended by the Selective Service System will, when the Military Department concerned has made a concurring determination, be reassigned to non-combatant training and duties as indicated in section VI.D.,

below. Like disposition will be made in those cases similarly determined by the Military Department concerned without an advisory opinion from Selective Service. Persons reassigned to non-combatant duties will be required to sign and date a statement, such as that appended as Enclosure 3.

4. Persons for whom neither 1-O or 1-A-O classification is recommended by Selective Service will, nevertheless, be considered by the Military Department concerned for discharge, non-combatant service, or such other disposition as, in the judgment of that Military Department, is warranted.

D. Persons who were classified 1-A-O by Selective Service prior to induction shall upon induction be transferred to a training center, or station, for recruit training and shall be subject to non-combatant service and training as defined in section III., above. Thereafter, upon completion of recruit training, they shall be assigned non-combatant duty. They may be transferred to the Hospital Corps, or Medical Department, for further training, provided they meet the requirements therefor. Such persons, because of assignment to medical units will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical organization. Any person who does not meet the requirements for this training, who fails to complete the prescribed course of instruction or who otherwise cannot be assigned to this duty, will be employed in other non-combatant duties if retained in the Service.

E. Determination by the Military Department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

414-433—71——3

F. When, in the judgment of the Commander concerned, any person reassigned to non-combatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the military Service who demonstrates similar behavior.

G. Commanders as specified by the Military Departments are authorized to return to an applicant, without action, any second or subsequent application when review reveals that it is substantially the same as a previous application disapproved by the Military Department.

VII. EFFECTIVE DATE AND IMPLEMENTATION

A. The provisions of this Directive will be effective thirty (30) days from the date of issuance.

B. Two (2) copies of implementing regulations, consistent with the provisions of this Directive, shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within ninety (90) days of its effective date.

Enclosures—4

1. Required Information
2. Statement (counselling concerning VA benefits)
3. Statement (counselling concerning designation as conscientious objector)
4. DD Form 1589

REQUIRED INFORMATION TO BE SUPPLIED BY APPLICANTS FOR DISCHARGE OR NON-COMBATANT SERVICE

Each person seeking release from active service from the Armed Forces, or assignment to non-combatant duties, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the Military Departments from requiring such additional information as they desire. The individual may submit such other information as desired.

A. General Information Concerning Applicant

1. Full name.
2. Military serial number; and Social Security Account number.
3. Selective Service number.
4. Service address.
5. Permanent home address.
6. Name and address of each school and college attended, together with the dates of attendance, and the type of school (public, church, military, commercial, etc.).
7. A chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, whether for monetary compensation or not. Include the type of work, name of employer, address of employer and the from/to date for each position or job held.
8. All former addresses and dates of residence at those addresses.
9. Parent's name and addresses. Indicate whether they are living or deceased.
10. The religious denomination or sect of both parents.

11. Was application made to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

12. When the applicant has served less than one hundred and eighty (180) days in the military Service, a statement by him as to whether he is willing to perform work under the Selective Service civilian work program for conscientious objectors, if discharged as a consicentious objector. Also a statement of the applicant as to whether he consents to the issuance of an order for such work by his local Selective Service Board.

B. Religious Training and Belief

1. A description of the nature of the belief which is the basis of the applicant's claim.

2. An explanation as to how, when, and from whom or from what source the applicant received the training and acquired the belief which is the basis of his claim.

3. The name and present address of the individual upon whom the applicant relies most for religious guidance in matters of conviction relating to his claim.

4. A statement as to circumstances, if any, under which the applicant believes in the use of force.

5. A description of the actions and behavior in the applicant's life which in his opinion most conspicuously demonstrates the consistency and depth of his religious convictions which gave rise to his claim.

6. A statement as to whether applicant has ever given public expression, written or oral, to the views expressed in his application as the basis for his claim. If so, the applicant will specify when and where.

c. Participation in Organizations

1. Information as whether applicant has ever been a member of any military organization or establishment before entering upon his present term of service. If so, the name and address of such organization will be given together with reasons why he became a member.

2. A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

a. The name of the sect, and the name and location of its governing body or head, if known.

b. When, where, and how the applicant became a member of said sect or organization?

c. The name and location of any church, congregation or meeting which the applicant customarily attends.

d. The name, title, and present address of the pastor or leader of such church, congregation or meeting.

e. A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

3. A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organizations.

D. References

The name, full address, occupation or position and relationship to applicant, concerning persons who could supply information as to the sincerity of applicant's professed convictions regarding participation in war.

STATEMENT (Counselling Concerning Veterans Administration Benefits)

I have been counselled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military Service as a conscientious objector. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, shall bar all rights, based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, government (converted) or National Service Life Insurance.

STATEMENT (Counselling Concerning Designation as Conscientious Objector)

I have been counselled concerning designation of a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector within the meaning of the statute and regulations governing conscientious objectors and am conscientiously opposed to participation in combatant training and service. I request assignment to non-combatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, re-enlistment, or active service in the Armed Forces.

ENCL (1) to COMDTINST 1900.2

7 OCT 1968

1360.6 (Encl 4)
May 20, 68

DEPARTMENT OF DEFENSE

SUMMARY SHEET FOR REVIEW OF CONSCIENTIOUS OBJECTOR APPLICATION

1. DATE OF APPLICATION	2. PLACE OF APPLICATION	3. DATE OF SUMMON ORDER
4. NAME IN FULL (Last - First - Middle)		5. SERVICE NO.
6. DATE OF BIRTH (Month-Day-Year)	7. MARITAL STATUS ☐ MARRIED ☐ SINGLE ☐ OTHER (Specify)	8. SELECTIVE SERVICE NO.
9. APPLICANT REQUESTS: ☐ DISMISSAL (1-O) ☐ NON-COMBATANT SERVICE (1-A-O)		
10. APPLIED FOR U. S. STATUS PRIOR TO ENTRY ON ACTIVE DUTY (If "YES" explain in Remarks the reasons, if "NO" explain in Remarks why application was not made.) ☐ YES ☐ NO		
11. WILLING TO PERFORM ALTERNATE CIVILIAN SERVICE (1-O) ☐ YES ☐ NO		
12. GRADE OR YEAR COMPLETED (Last School of Grade or Years completed. Also Correspondence Grade or Business College)	13. HIGH SCHOOL AND HIGH SCHOOL: 1 2 3 4 5 6 7 8 9 10 11 12	COLLEGE: 1 2 3 4 POST GRADUATE: 1 2 3 4
14. CIVILIAN OCCUPATION	15. NAME AND ADDRESS OF LAST EMPLOYER	
16. ENTERED SERVICE AT ☐ ENLISTMENT ☐ INDUCTION ☐ OTHER DATE		17. MOS ENTERED ON SERVICE
18. DATE OF ACTIVE DUTY	19. BRANCH OF SERVICE ☐ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS	20. COMPONENT ☐ REGULAR ☐ RESERVE
21. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED		
22. APPLICANT'S CHURCH MEMBERSHIP AND DATE OF JOINING		
23. APPLICANT'S PARENT CHURCH MEMBERSHIP		
24. STATEMENTS ATTACHED: CHAPLAIN ☐ YES ☐ NO (If "NO" explain in Remarks) PSYCHIATRIST OR MEDICAL OFFICER ☐ YES ☐ NO		
25. REMARKS		

FOR SELECTIVE SERVICE REVIEW COMMITTEE USE ONLY

26. RECOMMENDED ACTION	
27. DATE OF ACTION	28. TYPED NAME, TITLE AND SIGNATURE

DD, FORM 1589

DEPARTMENT OF DEFENSE
DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
1300.6 - Ch 2	February 5, 1970	1300 series

ATTACHMENTS

None

INSTRUCTIONS FOR RECIPIENTS

The following pen changes to DoD Directive 1300.6, "Conscientious Objectors," dated May 10, 1968, have been authorized.

PEN CHANGES

1. Pages 3 & 4; paragraph IV. B. 3. - Delete ALL of subparagraph c., and re-identify subparagraphs d. and e. as c. and d.

2. Page 7 - Delete ALL of paragraph VI. B. 6. Re-identify paragraph 7. as 6., and delete "When it is determined that an advisory opinion will not be requested from Selective Service,". Re-identify paragraph 8. as 7.

3. Pages 8 & 9, subsection VI. C. -

   a. Paragraph 1 - Delete the parenthetical phrase appearing on lines 1, 2, and 3,
   b. Change paragraph 3. (on pages 8 and 9) to read:

   "3. Persons for whom 1-A-O classification is approved will be reassigned to non-combatant training and duties as indicated in VI. D., below. Persons reassigned to non-combatant duties will be required to sign and date a statement such as that appended as enclosure 3."

4. Page 9 - Delete ALL of paragraph VI. C. 4.

EFFECTIVE DATE AND IMPLEMENTATION

This change is effective immediately. Two (2) copies of revised implementing documents shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within thirty (30) days.

Maurice W. Roche
MAURICE W. ROCHE
Director, Correspondence and Directives Division
OASD(Administration)

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD FORM 106-1

APPENDIX D

*AR 635–20

ARMY REGULATION

No. 635–20

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, D.C., 31 July 1970

PERSONNEL SEPARATIONS

CONSCIENTIOUS OBJECTION

Effective 15 August 1970

This revision is necessary to reflect the recent change from "religious beliefs" as the basis for requesting separation from the service for conscientious objection to "deeply held moral, ethical or religious beliefs." Local supplementation of this regulation is permitted but is not required. If supplements are issued, one copy of each will be furnished The Adjutant General ATTN: AGPO; other commands will furnish one copy of each to the next higher headquarters.

	Paragraph
Purpose	1
Scope	2
Policy	3
Procedure	4
Second and subsequent applications	5
Utilization, assignment and training of applicants for discharge as conscientious objectors	6
Discharge of personnel having less than 180 days service	7
Flagging action	8
Authority	9
Form of separation certificate	10
Appendix, Suggested Checklist for Processing 1–O Applications	

*This regulation supersedes AR 635–20, January 1970.

1. Purpose. This regulation sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of deeply held moral, ethical, or religious beliefs, claim conscientious objection to participation in war in any form.

2. Scope. This regulation applies equally to commissioned officers, warrant officers, and enlisted personnel in the active military service.

3. Policy. *a.* Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered. Requests for discharge after entering military service will not be favorably considered when—

(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

(3) Based solely upon considerations of policy, pragmatism or expediency.

(4) Based on objection to a particular war.

c. All requests for discharge based on conscientious objections will be considered on an individual basis in accordance with the facts and special circumstances in a particular case.

d. Final determination on all requests or discharge based on conscientious objection (to include those listed in *b* above) will be made at Headquarters, Department of the Army.

4. Procedure. *a.* Military personnel will submit applications for discharge by reason of conscientious objection on DA Form 2496 (Disposition Form) to their immediate commanding officers. The individual requesting discharge will include in his application, or as an inclosure thereto, the information indicated below as the minimum required for consideration of his request. This constitutes a formal application. If the required information is submitted as an inclosure, it will be dated and signed by the applicant. The individual may submit such other information as desired but all information to be considered will be submitted through military channels as prescribed herein.

(1) *General information.*

(*a*) Full name.

(*b*) SSAN.

(*c*) Selective service number.

(*d*) Service address.

(*e*) Permanent home address.

(*f*) Name and address of each school and college attended, together with the dates of attendance, and the type of school (public, church, military, commercial, etc.).

(*g*) A chronological list of all occupations, positions, jobs, or types of work other than as a student in school or college, whether for monetary compensation or not. Include the type of work, name of employer, address of employer, and the from/to date for each position or job held.

(*h*) All former addresses and dates of residence at those addresses.

(*i*) Parents' names and addresses. Indicate whether they are living or deceased.

(*j*) The religious denomination or sect of both parents.

(*k*) Was application made to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

(*l*) When the applicant has served less than 180 days in the military service, a statement as to willingness to perform work under the Selective Service civilian work program for conscientious objectors. Also a statement of the applicant as to whether he consents to the issuance of an order for such work by the local Selective Service Board.

(2) *Religious training or beliefs held.*

(*a*) A description of the nature of belief which is the basis of claim.

(*b*) Explain how, when, and from whom or from what source the applicant received the training and acquired the belief which is the basis of claim.

(*c*) The name and present address of the individual upon whom the applicant relies most for guidance in matters of conviction relating to claim.

(*d*) A statement as to circumstances, if any, under which the applicant believes in the use of force.

(*e*) A description of the actions and behavior in the applicant's life which, in his opinion most conspicuously demonstrates the consistency and sincerity of the convictions which gave rise to his claim.

(*f*) A statement as to whether applicant has ever given public expression, written or oral, to the views expressed in his application as the basis for claim. If so, specify when and where.

(3) *Participation in organizations.*

(*a*) Information as to whether applicant has ever been a member of any military organization or establishment before entering upon his present term of service. If so, the name and address of such organization will be given with reasons why he became a member.

(*b*) A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

1. The name of the sect, and the name and location of its governing body or head, if known.

2. When, where, and how the applicant became a member of said sect or organization.

3. The name and location of any church, congregation, or meeting which the applicant customarily attends.

4. The name, title, and present address of the pastor or leader of such church, congregation, or meeting.

5. A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

(*c*) A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organizations.

(4) *References.* The name, full address, occupation or position, and relationship to applicant, concerning persons who could supply information as to the sincerity of the applicant's professed convictions regarding participation in war.

b. Upon receipt of a request for discharge on the grounds of conscientious objection, the application should be processed in the following order:

(1) The individual's commanding officer will fully advise and counsel him concerning the provisions of section 3103, title 38, United States Code. That section provides, in pertinent part, that the discharge of a person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority will bar all rights (except Government insurance) of such persons under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counseling, the member will be required to sign and date the following statements:

"I have been counseled concerning possible nonentitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority shall bar all rights based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance."

(2) The individual's commanding officer will arrange for a counseling interview by a chaplain and a psychiatric interview by a psychiatrist (or medical officer if a psychiatrist is not available). The chaplain will submit a report of the interview directly to the applicant's commanding officer to include comments

on the sincerity of the applicant in his belief and an opinion as to the source of the belief. Likewise, the psychiatrist will submit a report of psychiatric evaluation indicating the presence of any psychiatric disorder which would warrant treatment or disposition through medical channels to the applicant's commanding officer.

(3) The applicant will then be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 0–3, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters. The designated hearing officer will not be an officer in the applicant's chain of command. The hearing is not an adversary proceeding.

(*a*) After permitting the applicant to be heard in support of this application and making such other inquiry into the merits of the application as he considers appropriate, the hearing officer will enter his recommendation and the reasons therefor into the file. The file will be returned to the applicant's immediate unit commander.

(*b*) If the applicant waives the opportunity to be heard, his waiver will be obtained in writing, signed, dated and made a part of the file.

(4) The unit commander will then take the following actions:

(*a*) Complete DD Form 1589 (Department of Defense Summary Sheet for Review of Conscientious Objector Application).

(*b*) Include the following information on DA Form 2496 as comment 2 and then forward the application through command channels.

1. Whether approval or disapproval is recommended. The reason(s) therefore will be included.

2. Duty and primary MOS (enlisted personnel only). only).

3. Whether medical board or physical evaluation board proceedings are pending or appropriate.

4. Whether under investigation, under charges, awaiting result of trial, absent without leave, or whether any flagging action has been taken in accordance with AR 600–31. (See paragraph 8 for information required when applicant is under flagging action.)

(5) Subsequent forwarding comments on DA Form 2496 will include recommendation for approval or disapproval and any other remarks that may be pertinent. Any remarks made must be substantiated in the record. Where applicable official records in the applicants' Military Personnel Record Jacket will be cited or attached to the file as inclosure.

(6) The application for discharge, together with the inclosure(s), DD Form 1589, reports of interviews, and the officer's recommendation or waiver required by (3) above will be forwarded directly from the headquarters of the officer exercising GCM jurisdiction over the applicant to The Adjutant General, ATTN: AGPO, Department of the Army, Washington, D.C. 20314 in quadruplicate (original and three copies).

c. When a request for discharge is denied, The Adjutant General will furnish the applicant the reason why discharge as a conscientious objector is not approved.

5. Second and subsequent applications. *a.* An application for discharge as a conscientious objector which has been considered and disapproved by Headquarters, Department of the Army, will not be reconsidered. However, an applicant may submit second and subsequent formal applications to his unit commander which will be considered if they are not sub-

stantially the same as the previously disapproved application(s).

b. When a second or subsequent formal application is received, the unit commander will forward the application and any documents submitted therewith to the commander specified in paragraph 2–17*a*, AR 635–200, who will review the application to determine whether it is substantially the same as a previous application disapproved by Headquarters, Department of the Army. Commanders specified in paragraph 2–17*a*, AR 635–200 are authorized to return to an applicant, without action, any second or subsequent application for discharge under this regulation when review reveals that it is substantially the same as a previous application disapproved by Headquarters, Department of the Army. These commanders are not authorized to delegate this authority to subordinate commanders without prior approval of the Secretary of the Army.

c. If the commander specified in paragraph 2–17*a*, AR 635–200, determines that the second or subsequent application is not substantially the same as a previously disapproved application, he will return the application to the applicant's unit commander for processing in accordance with the provisions of this regulation, including a new Chaplain's report, psychiatrist's report (if over 6 months has elapsed), and a new hearing officer's report (or waiver).

6. Utilization, assignment and training of applicants for discharge as conscientious objectors. *a.* Except as provided in b below, individuals who have submitted formal applicants (para 4*a*) for discharge based on conscientious objection will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications. In the

case of trainees, this means that they will not be required to train in the study, use, or handling of arms or weapons. It does not preclude the trainees from participating in those aspects of training that do not involve the bearing or use of arms, weapons, or munitions. Except for this restriction, conscientious objector applicants are subject to all regulations to include those on training.

b. In the case of 2nd and subsequent applications, the duty limitations of *a* above shall not apply if the applicant's immediate commander determines that the application is substantially the same as a previously disapproved application for discharge as a conscientious objector.

c. An individual on orders for reassignment who desires to apply for discharge, but does not have the required evidence (para 4*a*) to support an application is authorized one delay of 7 days. If at the end of 7 days the individual does not have evidence to support a written request for discharge, he will be required to comply with reassignment orders. An individual who has departed his unit of assignment in compliance with reassignment orders may not make application for discharge as a conscientious objector until he arrives at his new permanent duty station. The foregoing does not apply to individuals who are TDY enroute on reassignment orders for period in excess of eight weeks.

d. When a request for discharge has been denied, individual will comply with reassignment orders, be assigned to any duties, or be required to participate in any type of training. Application to the Army Board for Correction of Military Records has no effect on such reassignment, performance of any duties, or participation in any type of training.

e. Notwithstanding the retention requirements in *a* and *b* above, an individual who applies for discharge and is confined as a result of courtmartial sentence to confinement in excess of 30 days must be transferred and assigned to a United States Army correctional holding detachment under the mandatory provisions of paragraph 5, AR 190–23. His pending application for discharge will be transferred to the gaining commander for appropriate action.

7. Discharge of personnel having less than 180 days service. Personnel who have less than 180 days on active duty (excluding active duty for training) when discharged will be discharged by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. National Headquarters, Selective Service System, 1724 F Street NW., Washington, D.C. 20435, will be notified promptly of date of discharge from military service; advised that the individual has not completed 180 days active duty; and requested to induct the individual into the Selective Service Conscientious Objectors' Work Program.

8. Flagging action. Applications for discharge as conscientious objectors submitted by individuals who are under flagging action under the provisions of AR 600–31 will be forwarded to Headquarters, Department of the Army. The commander who initiated the flaging action will provide and forward with the application a detailed account of the events which prompted him to flag the individual's personnel records.

9. Authority. Persons determined to meet the criteria for 1–0 classification will normally be discharged "For the convenience of the Government."

a. Commissioned officers and warrant officers. Authority AR 635–20 and SPN 558 for separation will

be included in orders announcing discharge of individuals.

b. Enlisted personnel. Authority AR 635–20 and SPN 318 for discharge will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer processing for discharge.

10. Form of separation certificate. *a.* An Honorable Discharge Certificate (DD Form 256A) or a General Discharge Certificate (DD Form 257A) will be furnished. Commissioned officers and warrant officers will be furnished a discharge certificate in accordance with AR 635–5 or as directed by Headquarters, Department of the Army. Enlisted personnel will be furnished a discharge certificate in accordance with AR 635–200.

b. Armed Forces of the United States Report of Transfer or Discharge (DD Form 214) will be furnished each individual discharged from service under this regulation.

c. When discharged because of conscientious objection the reason and authority for discharge (item 11*c*, DD Form 214) will be "AR 635–20, Conscientious Objection" with the appropriate separation program number.

APPENDIX

SUGGESTED CHECKLIST FOR PROCESSING 1-O APPLICATIONS

	Yes	No
1. Does the applicant object to participation in war in any form? If "No", applicant should be advised to submit a request for I-A-O conscientious objector classification under provisions of AR 600-200.		
2. Has applicant included all the information required in paragraph 4a? If information is not known, the application should so state.		
3. Has the applicant signed DA Form 2496 (DF) and where applicable, the inclosure?		
4. Has the applicant been advised letters from the individuals listed as references can be helpful and that listing references without obtaining letters serves little purpose?		
5. Has the applicant been advised he may submit any information he considers relevant to his request but all information will be submitted through military channels?		
6. Has the applicant's unit commander counseled him on the provisions of section 3163, title 38, United States Code and had him sign the exact statement contained in paragraph 4b(1)? (This statement must be dated when signed.)		
7. Has the unit commander scheduled an interview with a chaplain and medical officer?		
8. Has the chaplain commented on the sincerity of the applicant and given an opinion as to the source of his beliefs?		
9. Has the medical officer indicated that the applicant is free of psychiatric disorder which would warrant treatment or separation from the Army?		
10. Has the applicant been afforded an opportunity to appear before a designated disinterested hearing officer (O-3 or higher) not in his chain of command?		
11. If the applicant waived the opportunity for a hearing, has his waiver been obtained in writing?		
12. Has the applicant been provided reasonable time to obtain counsel, if desired, at his hearing?		
13. Has the hearing officer: a. Had an opportunity to study the application? b. Examined the applicant's military personnel records to determine if applications had been made for discharge under other Army regulations, what schools or assignment had been requested, if any, and any other data considered pertinent?		

SUGGESTED CHECKLIST FOR PROCESSING 1-0 APPLICATIONS—Continued

	Yes	No
c. Determined when the alleged conscientious objection became fixed? (Personnel with six months or more active duty will not be required to work in Selective Service Program.) d. Made a recommendation the application be approved or disapproved and given his reasons therefor.		
14. Has the unit commander completed DD Form 1589?		
15. Has the unit commander recommended approval or disapproval of the applicant's request and cited the reasoning used to make a decision?		
16. If the unit commander recommends the request for discharge be disapproved but recommends the man be classified as a noncombatant, has the applicant been advised he may apply for I-A-O classification status under provisions of AR 600-200 and refused to do so?		
17. Have the officers in the chain of command recommended approval or disapproval? If the applicant was interviewed by a commander, his endorsement should so state.		
18. Are all incloures signed and dated?		
19. Have four copies of the application been prepared for submission to Department of the Army?		

The proponent agency of this regulation is The Adjutant General's Office. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications) to The Adjutant General, ATTN: AGPO, Department of the Army, Washington, DC 20314.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:
KENNETH G. WICKHAM,
Major General, United States Army,
The Adjutant General.

Distribution:
To be distributed in accordance with DA Form 12-9 requirements for AR, Personnel Separations:
Active Army: A (Qty rqr block no. 542)
ARNG: D (Qty rqr block no. 545)
USAR: D (Qty rqr block no. 545)

U.S. GOVERNMENT PRINTING OFFICE: 1970 O—400-452

U.S. GOVERNMENT PRINTING OFFICE: 1971

FILE COPY

FILED

FEB 6 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
593 Market Street, Suite 250,
San Francisco, California 94105,
Telephone: (415) 433-2750,

MARVIN M. KARPATKIN,
ACLU Foundation,
156 Fifth Avenue,
New York, New York 10010,
Telephone: (212) 765-2700,

NEIL HORTON,
1300 Broadway,
Oakland, California 94612,
Telephone: (415) 452-2133,

STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN & LIPPETT,
500 Sansome Street,
San Francisco, California 94111,
Telephone: (415) 434-0610,

Attorneys for Petitioner.

Subject Index

I — Page

The government's statistics 1

II

The Department of Defense directive on conscientious objectors, by its terms, excludes claims such as Ehlert's..... 5

III

Even if the army would consider claims such as Ehlert's, it is neither the proper forum nor a forum available to the petitioner 8

Table of Authorities Cited

Cases — Pages

Grigsby v. Laird (Civil Action No. SA70CA129)..... 7

Mulloy v. United States, ... U.S. ....., 26 L.Ed.2d 362 (1970) 8

O'Callahan v. Parker, 395 U.S. 258 (1969)..... 9

United States v. Ehlert, 422 F.2d 332 (9 Cir. 1970)..... 3

United States v. Freeman, 388 F.2d 246 (7 Cir. 1967)..... 8

United States v. Gearey, 368 F.2d 144 (2 Cir. 1966)..... 3

United States v. Nordlof, No. 18051, January 5, 1971..... 7

Regulations

Army Regulation No. 635-20..... 6

Selective Service Regulations (32 C.F.R. Sec. 1625.2)...2, 3, 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I.

THE GOVERNMENT'S STATISTICS

A. The government's statistics on the "highest percentage of post-induction notice conscientious-objector claims" contained in Appendix A of the Supplemental Memorandum for the United States are of no help in determining the number of cases extant similar to Ehlert's. The government throughout this litigation has been unable to make the distinc-

tion between a late conscientious objector claim (that is to say, a claim of conscientious objector status that existed before, but was not claimed until after, the mailing of the induction notice) and a late-maturing claim (that is to say, a claim of status which did not exist until a time subsequent to the mailing of the induction notice). The government's blindness to that crucial distinction has now been statistically perpetuated; Appendix A lumps all post-induction notice claims together. Now, the reason the distinction is so crucial is because it is the nub of the case. Petitioner contends that his local board should have reopened *because* his was not a late claim but a late-maturing claim and that *therefore* he comes within the provisions of Selective Service Regulations, 32 C.F.R. §1625.2. A late claimant, as distinguished from a late-maturing claimant, might argue that his claim too should be heard by his local board (see Brief for Petitioner, p. 17, fn. 27) but he could not argue that he came within the provisions of Section 1625.2 which is what this case is all about. Thus the statistics do not tell us anything about the problem at hand.

B. Although the government's statistics do not tell us anything about late-maturing claims, they do tell us something about post-induction claims as a whole: and that is that the percentage of post-induction notice conscientious-objector claims appears to be unaffected by judicial construction of §1625.2. It will be noted that the highest percentage of post-induction claims occurs in the District of Columbia where the Circuit Court has not spoken on the question. The

next highest percentage is in New York where in *United States v. Gearey*, 368 F.2d 144 (2 Cir. 1966), the Second Circuit interpreted Section 1625.2 to include post-induction claims. New York is followed by California and Oregon where the rule of *United States v. Ehlert*, 422 F.2d 332 (9 Cir. 1970) excludes late-maturing conscientious objector claims from the ambit of §1625.2.[1] Oregon is followed by Massachusetts, where the First Circuit has not passed on the question, and Massachusetts by Washington where, once again, the rule of *Ehlert* is in force.

The lack of correlation between judicial construction of §1625.2 and the number of post-induction notice conscientious objector claims should not be surprising. Few draftees have reached that level of legal sophistication where they are familiar with opinions interpreting the regulations of administrative agencies. And we can be certain that hardly any draftees concern themselves with the possible significance of this Court's granting of a Petition for Writ of Certiorari. See Supplemental Memorandum for the United States, Appendix A, p. 5, fn. 1. Indeed, what may influence the number of post-induction notice conscientious-objection claims appears to be a mystery incapable of statistical solution. Why was the percentage of post-induction conscientious objector claims 9.67 when the call was 10,000, 4.58 when the

[1]It may be that the Ninth Circuit's *Ehlert* rule is followed in Oregon but not in California. See Brief for Petitioner, p. 28, fn. 53. If so, the almost identical percentages for California and Oregon forcefully demonstrate that Selective Service recognition of late-maturing claims has no effect on the number of post-induction notice conscientious objector claims.

call was 12,000, and 6.55 when the call was 8,000? Even the size of the draft call does not seem to be a factor. And why was the percentage so inordinately large in August? The August percentage is double that of October. And if August is factored out of the government's "national summary" equation, we discover that the overall percentage of post-induction notice conscientious-objector claims drops from 6.4% to 5.5%. The lesson is clear: if the government wants to reduce the number of post-induction conscientious-objector claims it should not draft in August. But why that should be the case nobody knows.

C. The government's statistics are also beside the point. The late claimants, no matter what their number, are not going to go away. The late-maturing claimants are surely entitled to be heard in some forum. It cannot be argued that they have slept on their rights or have waived an opportunity to raise their claim and Congress has unequivocally provided that they are not to serve. If §1625.2 is interpreted to exclude such conscientious objectors they will have no forum. As we shall demonstrate, *infra,* even these who are able to submit to induction will not be heard in the army and, of course, the Courts cannot pass upon their claim. With no forum to hear their claim, the late-maturing conscientious objectors will be prosecuted and jailed. As a consequence, the already overburdened District Courts will be inundated with numerous cases that do not belong there.

II.

THE DEPARTMENT OF DEFENSE DIRECTIVE ON CONSCIENTIOUS OBJECTORS, BY ITS TERMS, EXCLUDES CLAIMS SUCH AS EHLERT'S

In its Brief for the United States, the government said (p. 25):

> "While it is true that the claim can no longer properly be raised before the local board, it can be considered by the military immediately upon induction; the suggestion that the military would offer no relief for any conscientious objection developed between a registrant's notification and his induction is . . . 'more fancied than real. . . .'"

In its Supplemental Memorandum, the government says:

> "[T]he Department of the Army is now, and in the past has been, interpreting Department of Defense Directive No. 1300.6 in the manner indicated in our merits brief in this case (Gov't Br., pp. 24-26). A letter has been obtained from the General Counsel of the Department of the Army verifying this fact, and a copy is attached hereto as Appendix B."

When we turn to Appendix B we discover that the eagerly awaited letter says nothing of the sort. It merely describes how conscientious objector claims are handled and then, in a neat piece of evasion, states: "The present practice grants the soldier the opportunity to *file* in such cases." (Supplemental Memorandum for the United States, p. 7). (Emphasis added). A policy which permits persons to file claims is a long way from a policy stating that such claims will

be considered on the merits. A soldier can *file* in the District Court too but whether the District Court will determine that it has jurisdiction to consder the claim is a significantly different question.

We do not think that General Counsel Jordan simply expressed himself inartfully, for the government has also provided us, in Appendix C, with the pertinent Directive. That Directive establishes two classes of conscientious objector claims that will be considered by the Armed Forces: a) "Persons inducted into military service who claim to be conscientious objectors and state that they were so classified by their local board, but their records do not so indicate . . ." and b) "persons who have already served a portion of their obligated service who request discharge or noncombatant service for conscientious objection . . ." Supplemental Memorandum for the United States, Appendix C, p. 13. In other words, the Armed Services will consider, at induction, the claims of those conscientious objectors whose records do not properly reflect that they have been granted that status and no others. After induction, the army will consider those claims that have matured after military service has begun. Ehlert's case fits into neither classification and thus the directive, by its own terms, substantiates our contention that claims maturing after a notice to report for induction but before the beginning of military service are not considered by the Armed Forces. Appendix D, Army Regulation No. 635-20, also confirms that Armed Forces policy excludes consideration of claims such as Ehlert's. It states:

> "Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, *when such objection develops subsequent to entry into the military service.*"
>
> Supplemental Memorandum for the United States, Appendix D, p. 26 (emphasis added).

If the Armed Services were willing to hear claims such as Ehlert's they could say so in their letters, directives and regulations. They do not say so because in fact their policy is to the contrary. We attach, as Appendix A to this Reply, a copy of the Decision of the United States District Court, Western District of Texas, San Antonio Division, in *Grigsby v. Laird* (Civil Action No. SA70CA129), a decision rendered on May 6, 1970, two days after the grant of certiorari in this case. Grigsby's was a late-maturing claim but his case arose in the Fifth Circuit where local boards do not recognize §1625.2 as applicable to late-maturing conscientious objection claims. Therefore, Grigsby submitted to induction and applied for conscientious objector status pursuant to the Department of Defense Directive. He was turned down because his "thoughts were fixed prior to entry into the military service." The government successfully contended in the District Court that that was the proper construction of the Directive and Private Grigsby also lost on his petition for writ of habeas corpus.[2]

---

[2]We also attach, as Appendix B to this Memorandum, a reproduction of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Nordlof*, No. 18051, January 5, 1971, which we refered to at oral argument.

III

EVEN IF THE ARMY WOULD CONSIDER CLAIMS SUCH AS EHLERT'S, IT IS NEITHER THE PROPER FORUM NOR A FORUM AVAILABLE TO THE PETITIONER

In apportioning the consideration of conscientious objector claims among forums the congressional scheme is clear, objections that mature prior to induction into the Armed Forces are to be considered by local boards. It is the local boards that have the expertise, and the primary task of removing from the manpower pool those persons whom Congress says shall not serve is theirs'. As we noted in our Reply Brief (pp. 23-24), Congress in 1967 rejected an amendment to the Selective Service Act which would have required all conscientious objectors to submit to induction and to noncombatant service. The reasons the amendment was rejected are doubtless two:

1) Since a great many conscientious objectors consider submission to induction itself inconsistent with their scruples, such a requirement would not promote the Congressional scheme for conscientious objectors. As this Court noted in *Mulloy v. United States*, ... U.S. ....., 26 L.Ed.2d 362, 368, fn. 6 (1970):

> "A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy (to challenge the legality of his classification) because his religious belief prevents him from accepting induction under any circumstances."[3]

2) Providing for Armed Services consideration of conscientious objector claims that could easily be

[3]This Court was quoting from the decision in *United States v. Freeman*, 388 F.2d 246, 249 (7 Cir. 1967).

heard elsewhere would be inefficient forum apportionment. It is not the primary task of the Armed Forces, as it is of the Selective Service Boards, to determine draft status. Assigning that task to the Armed Forces when not absolutely necessary detracts from their primary business of fighting wars. Cf. *O'Callahan v. Parker,* 395 U.S. 258, 262 (1969).

Dated, January, 1971.

Respectfully submitted,

PAUL N. HALVONIK,
CHARLES C. MARSON,
American Civil Liberties Union
of Northern California,
MARVIN M. KARPATKIN,
ACLU Foundation,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
HERZSTEIN, MAIER, FRIEDMAN & LIPPETT,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States District Court
Western District of Texas
San Antonio Division

Civil Action No. SA70CA129

Private William Dickingson Grigsby

vs.

Melvin Laird as Secretary of Defense; Stanley Resor as Secretary of the Army; Major General George Ruhlen as Commanding General, Fort Sam Houston, Texas; Colonel Charles Pixley as Commanding Officer of U. S. Army Medical Training Center, Fort Sam Houston, Texas; and Major Donald Conrad as Commanding Officer of Headquarters, Headquarters Company, Receiving and Holding, Medical Training Center, Fort Sam Houston, Texas; and Local Draft Board No. 57, Selective Service System, Richmond, Virginia.

ORDER

On this the 6th day of May, 1970, came on to be considered the motion for new trial submitted by the petitioner herein, and as grounds therefor, he contends the following: (1) The judgment of the Court

is contrary to the evidence; (2) The judgment of the Court is contrary to the law; (3) The judgment of the Court is contrary to the clear weight of the evidence; (4) Because of all of the grounds set out in Private Grigsby's amended petition for habeas corpus; (5) Because Private Grigsby has been denied equal protection of the law; and (6) Because Private Grigsby's draft board in Virginia refused to rule on the merits of his conscientious objector claim, and then, thereafter, the United States Army also refused to rule on the merits of his conscientious objector claim contending that the Private's thoughts were fixed prior to entry into the military service.

There is no merit to either of the grounds set forth in the motion. With respect to ground number (6), this Court agrees with the findings of the Review Board that petitioner's beliefs became fixed prior to his entry into the active military service. In this connection the Board based its findings on the following:

> (a) Grigsby's application and the information included on the DD Form 1589 reflect that he was granted classification 1-A-O by his local draft board in September of 1968. Grigsby states in his application that after his 1-A-O classification he began to think about his participation as a noncombatant. He states "however, in the year that preceded my induction, I talked to many regarding my position I began to have doubts regarding what my real contribution to the military should be. So, when I was notified regarding my induction, I appealed my induction into the military and asked to be placed in

alternate service in a hospital somewhere. The draft board reply to my appeal was that my case had already been closed and they saw no reason to reopen it; . . ."

(b) Grigsby's application includes the 25 August 1969 letter which he wrote to his draft board requesting that he changed from classification 1-A-O to a classification which would allow him alternate service in some institution such as a civilian hospital. This letter and the admissions made cited above indicate that Grigsby's views existed prior to his entry into the active military service."

(c) The letter included from Grigsby's parents (Inclosure 5) indicates that he changed his mind concerning service as a 1-A-O prior to his entry. His parents state "as time passed, however, his conviction against killing, war and violence became even deeper. When he received his draft notice he appeared before a Selective Service Board, asking that his case be reopened and they consider assigning him to a service in an institution of some sort."

(d) Grigsby claims that his views are even stronger now than they were prior to his entry into the active military service. However, this self-serving claim is not believable since Grigsby's own admission, the letter which he wrote to his draft board, and the information provided by his parents all indicate that he made the transformation from a 1-A-O to that of a 1-O prior to his

entry into the active military service. Therefore, his application may not be favorably considered under the provisions of AR 635-20.

While petitioner indicated a change in views in his letter to his local board, dated August 25, 1969, after receipt of the order to report for induction but before he was inducted into the Army, he did not demonstrate that his beliefs were by reason of religious training and belief, rather than by reason of political, sociological, or philosophical views, or a merely personal moral code. In his letter, petitioner wholly failed to present a prima facie case, and the Draft Board was justified in its finding that there had not been a change in petitioner's status resulting from circumstances over which he had no control. See *Magaro v. Major General Cassidy, Etc.,* Opinion No. 27940 (CA 5th Cir., April 23, 1970).

In view of the foregoing, it is therefore

Ordered that petitioner's motion for new trial, be and it is hereby in all things, Denied.

Entered this 6th day of May, 1970, at San Antonio, Texas.

Adrian A. Spears,
United States District Judge

A true copy of the original, I certify.
(Seal) Dan W. Benedict, Clerk,
By Frances Mailey, Deputy.
Filed May 6, 1970,
Dan W. Benedict, Clerk,
By Frances Mailey, Deputy.

Appendix B

In the United States Court of Appeals
for the Seventh Circuit

No. 18051

September Term and Session, 1970

United States of America,
Plaintiff-Appellee,
vs.
Dwight Stuart Nordlof,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

January 5, 1971

Before KNOCH, *Senior Circuit Judge,* KILEY and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendant Nordlof appeals from his conviction, without a jury, of refusing to submit to induction into the armed forces in violation of 50 U.S.C. App. § 462. The issue presented is

whether a Selective Service registrant's claim for conscientious objector classification made for the first time after receipt of an Order to Report for Induction may be a "change in status resulting from circumstances over which the registrant had no control" within the meaning of 32 C.F.R. § 1625.2. The district court held that such a belated claim cannot, as a matter of law, be such a change of status. We hold to the contrary, and reverse Nordlof's conviction.

Nordlof registered for the draft November 18, 1963, and was classified I-A. He was later reclassified II-S, student deferment, until August, 1968, when he was reclassified I-A. His appeal from that classification was denied. Thereafter he was ordered to report for induction on October 28, 1968. He reported, but refused to submit.

At the induction center, Nordlof wrote and presented to a Selective Service System official a six-page statement containing his claim of conscientious objection to war. Presumably Nordlof's claim did not reach, and was not considered by his local board.

On July 1, 1969, Nordlof was indicted for failure to submit to induction. Before his trial Nordlof moved for remandment to the local board for its determination on his conscientious objection claim. The motion was denied. At trial, his defense testimony[1] in support

[1]The following testimony is before us as an offer of proof. Nordlof was a high school teacher in Fort Madison, Iowa when he met Shirley Guzman in December, 1967. Miss Guzman is a Jehovah Witness and the daughter of the presiding minister of the Kingdom Hall in Fort Madison. They began to date in spring of 1968, and were later married. In August and September of 1968, Nordlof

of his conscientious objection claim was stricken on the ground that Selective Service Regulation § 1625.2 precludes a registrant from asserting his conscientious objection status after receipt of an order to report for induction. The authority for the district court's ruling was this court's decision in *United States v. Porter,* 334 F.2d 792 (7th Cir. 1964). Nordlof's main challenge is with respect to the court's determination of this issue.

Section 1625.2 provides, in relevant part:

> ". . . The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. 32 C.F.R. § 1625.2.

The courts of appeals are divided in their holdings on whether this section permits a local board to reopen a registrant's classification after receipt of a post-induction order conscientious objection claim.[2] This

---

began discussing with Miss Guzman's father the teachings of the Bible concerning war and killing. Nordlof testified that during the month of October he began to "make his mind over" but that he was not sure of his convictions until the day of his induction when he refused to enter the army.

[2]The Fourth, Sixth and Ninth Circuits have held that a local board may not reopen upon receipt of a post-induction order conscientious objection claim. *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966); *United States v. Jennison,* 402 F.2d 51 (6th Cir. 1968), *cert. denied,* 394 U.S. 912; *Ehlert v. United States,* 422 F.2d 332 (9th Cir. 1970). The Second, Third and Tenth Circuits have held to the contrary. *United States v. Gearey,* 368 F.2d 144 (2nd Cir. 1966), *cert. denied,* 389 U.S. 959 (1967); *Scott v. Volatile,* No. 18546 (3rd Cir. Sept. 15, 1970); *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959).

court is in the negative camp by virtue of *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953).

In *Schoebel* this court decided conscientious objections resulting from "the promptings of a registrant's conscience" cannot be a "change in status resulting from circumstances over which the registrant had no control;" and accordingly that Schoebel's board could not have reopened his classification under § 1625.2 on his claim made for the first time after the order to report for induction. The decision in *Porter v. United States,* 334 F.2d 792 (7th Cir. 1964), which the district court relied on in its decision against Nordlof, was based on authority of *Schoebel,* as was the earlier case of *United States v. Porter,* 314 F.2d 833 (7th Cir. 1963).

Nordlof urges that *Schoebel* should be overruled. He relies principally upon the holding of the Second Circuit in *United States v. Gearey,* 368 F.2d 144 (2nd Cir. 1966). In *Gearey,* reaffirmed in *United States v. Stafford,* 389 F.2d 215 (2nd Cir. 1968), the court held that a conscientious objector claim can "mature" or "crystallize" after a registrant has received his notice to report for induction, and that this may be a change in status resulting from circumstances over which the registrant has no control within the meaning of § 1625.2, thereby entitling him to a reopening of his classification. This holding was followed by the recent Third Circuit decision in *Scott v. Volatile,* No. 18546 (3rd Cir., September 15, 1970).

The government argues, on the other hand, that the ruling in *Schoebel* is sound and should not be over-

turned. It relies heavily upon the reasoning in the Ninth Circuit's recent *en banc* decision (five of thirteen judges dissenting) in *Ehlert v. United States,* 422 F.2d 332 (1970). The court in *Ehlert* considered, but declined to follow, the Second Circuit's decision in *Gearey.* The court stated that Ehlert as a rational human being is in "complete charge of his own thinking" and therefore a belated claim for conscientious objector classification is a circumstance within his control. The court also thought that conscientious objection claims pose more difficulty of adjudication for boards than other claims because of the necessity of determining sincerity with a depth inquiry into claimant's family life, religious training, etc. The court went on to say that if it were to follow *Gearey,* the local board would be required to determine when the registrant's beliefs crystallized, or more accurately, when the registrant claims that his beliefs crystallized; and that such a procedure would be unduly burdensome for local boards.

We cannot accept the reasoning of the *Ehlert* court. Even assuming that the majority is correct in stating that man is in complete charge of his own thinking, it does not follow that man can control his conscience. We think conscience is not the same as thinking. Webster defines conscience as "a knowledge or feeling of right and wrong, with a compulsion to do right; moral judgment that prohibits or opposes the violation of a previously recognized ethical principle."[3] Implicit in this definition is the notion that the dictates of con-

[3]Webster's New World Dictionary (1964).

science are involuntary and compulsory and outside the control of the holder of the beliefs. We can perhaps control our thinking concerning whether and to what extent a moral duty exists prior to the operation of conscience on a moral issue. We can also control, when faced with the moral issue, whether or not to follow the dictates of conscience. But, as Kant points out, when a moral issue presents itself and demands action, "then conscience speaks involuntarily and inevitably."[4] This view that conscience is beyond the control of its subject appears to us as the better view, and is borne out by eminent philosophical and theological authority.[5]

We therefore favor the views of Judge Seitz, expressed in *Scott*: "one cannot sincerely turn his conscience on and off at will;" and of Judge Merrill in his dissent in *Ehlert:* "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." 422 F.2d at 339. We conclude that conscience is beyond the control of the registrant.

---

[4] *Critique of Practical Reason* (Longmans ed. 1954) 311-12.

[5] S. Juergens, *Newman on the Psychology of Faith* (1928) 155-56; D. Hume, *Treatise* (Vol. 2, Everyman ed.) 313-14; H. H. Price, "Belief and Will," *Proceedings of the Aristotelian Society* (Vol. XXVIII, 1954) 14-15; Aquinas, *Summa Theologica*, Q. 79, Art. 13; Bonhoeffer, *Ethics* (SCM Press 1955) 5ff.; Jung, "A Psychological View of Conscience," *Studies in Jungian Thought: Conscience* (Northwestern Univ. 1970) 103; William James, *The Principles of Psychology* (Dover 1918) 672. *See generally* Judge Aldisert's concurring opinion in *Scott v. Volatile*, No. 18546 (3rd Cir., Sept. 15, 1970).

It is our further view that a conscientious objection belief may mature and crystallize after the registrant receives his Order to Report for Induction. The general formation of conscience is said by Freud to commence early in childhood, and development is a continuous process of meeting particular moral decisions.[6] The late Paul Tillich said "The constitution of a person as a person never comes to an end during his whole life process," it is a "process of self-integration . . . a continuous struggle with disintegration," in which he is free to develop "the moral side of the function of self-integration" in the totality of acts which face him in life.[7] This view is supported by other eminent authority.[8]

It follows that a conscientious objection to war, while developing before, can mature after, a registrant has received an Order to Report for Induction. As Judge Seitz in *Scott* states: "Although a registrant may have no conscientious objector leanings at all when he registers, his beliefs may later begin to evolve toward conscientious objection."[9] This view is impliedly accepted by the Supreme Court in *Welsh v.*

---

[6]R. W. Woodward, *Psychology* (Fourth ed.) 180, 187.

[7]P. Tillich, *Systematic Theology* (Vol. 3, 1963) 32-51.

[8]Kant, *Lectures on Ethics* (Torchbook ed. 1963) 134; ....., *Philosophy of Hegel* (Modern Library ed. 1953) 258; Brennan, *The Ethics of William James* (1961) 129-38; S. Jurgens, *Newman on the Psychology of Faith* (1928) 135-37.

[9]We disagree with *Scott* to the extent that it requires, or permits, the local board to consider, in determining whether to reopen the registrant's classification, the sincerity of the registrant's beliefs. *See United States v. Mulloy*, 398 U.S. 410, 417-18 (1970); *United States v. Freeman*, 388 F.2d 246, 248-49 (7th Cir. 1967). *See also* footnote 12 *infra*.

United States, 398 U.S. 333, 336 (1970). The term of this particular development can be due, in part, to the receipt of the notice itself. As Judge Kaufman in *Gearey*, at page 150, says: "Realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

We think Nordlof's readings in the Bible and his discussions with Mr. Guzman could have given him a view different from what he previously had concerning his duty with respect to war. His conscience then could have begun to form with respect to the particular moral issue that was facing him, and might have reached its fruition only when his induction was at hand.

We conclude that crystallization of conscientious objection beliefs may be a change in status resulting from circumstances over which the registrant had no control. We therefore overrule *Schoebel* as the law of this circuit.[10]

We are not impressed by the government's argument that, practically speaking, belated crystallization is "highly improbable if not impossible." We cannot speculate that Nordlof's board upon consideration of

---

[10]Since this opinion overrules *United States v. Schoebel*, 201 F.2d 31 (7th Cir. 1953), we have circulated the opinion to the active members of the court not on the panel. A majority of the court agrees that *Schoebel* should be overruled.

The decisions in *United States v. Porter*, 314 F.2d 833 (7th Cir. 1963), and *Porter v. United States*, 334 F.2d 792 (7th Cir. 1964), on the issue before us fall with *Schoebel*.

his claim would view it as "highly improbable." Moreover, such a determination goes to the merits of Nordlof's claims, which are not to be considered unless a reopening is granted. *Mulloy v. United States,* 398 U.S. 410, 416-18 (1970); *United States v. Freeman,* 388 F.2d 246, 248-49 (7th Cir. 1967).

Nor do we think the government is aided by the fact that once a claimant is inducted he has the "absolute right" to file a conscientious objection claim which, if he persuades the military to grant it, will result in discharge from combat service. This post-induction process effectually presupposes that Nordlof's claim is not sincere, for if he sincerely objected to participation in war, he would not enter the military. Moreover, Army Regulation 635-20,[11] which concerns post-induction claims for conscientious objection status made while in the army, might be interpreted to preclude claims that crystallized prior to induction but were denied by the Selective Service System because made after an induction order was mailed.

And even if a board determination of the sincerity of a conscientious objection claim is burdensome to local boards, we cannot agree with the *Ehlert* court that this is a relevant ground for turning away the

[11]Army Regulation 635-20, in paragraph 3b, provides:

Requests for discharge after entering military service will not be accepted when—

(1) Based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

claim. The only question is whether a recently formed conscientious objection belief is, or may be, a change in status resulting from a circumstance which is beyond the control of the registrant, thereby entitling the registrant to a reopening. This is the criterion set forth in § 1625.2, and the only relevant inquiry is whether conscientious objection meets the criterion.

We reject also the government's argument that Nordlof had time between his registration and induction order to inform his board of his "newly acquired beliefs," and that by failure to do so has waived his right to have the board consider his claim. This argument presupposes the correctness of the *Schoebel* rule, that a crystallization of belief after induction order cannot as a matter of law amount to a circumstance over which Nordlof had no control. It also presupposes that Nordlof's conscience was formed before receipt of the induction order so as to render his claim waivable. Belatedness itself is not a good reason for refusing to consider a claim, although it is a factor a board may consider on the board's ultimate question of sincerity, once a reopening has been granted. *United States v. Gearey,* 368 F.2d at 149-50. This court's decision in *United States v. Angelico,* 427 F.2d 288 (7th Cir. 1970), therefore does not militate against our rejection of the government's waiver claim.

Finally, we see no merit in the government's contention that Nordlof did not at any time file his claim with the board. The administrative process had not terminated when he filed his claim with an official

within the Selective Service System who should have forwarded it to the board.[12] *United States v. Stafford*, 389 F.2d at 219.

The judgment is reversed.

---

[12]We think the proper procedure for the board to follow in considering claims of conscientious objection made after the registrant receives an order to report for induction is as follows: The board must first consider the claim, *United States v. Shermeister*, 425 F.2d 1362 (7th Cir. 1970), and determine when the registrant's beliefs matured. If it decides—with a basis in fact in the record and assuming that the registrant's statements are true, as required by § 1625.2—that the beliefs matured before the registrant received the order or that the facts presented add no new information to the file or that the claim does not present a prima facie showing for a new classification, the claim can be denied. *See United States v. Stafford*, 389 F.2d 215, 219 (2nd Cir. 1968). If the board decides that the claim matured after receipt of the order, discloses a prima facie showing for a new classification, and is not refuted by reliable facts in the file, the board must reopen and determine the registrant's sincerity in making the claim. *Mulloy v. United States*, 398 U.S. 410, 415-16 (1970).

Under this procedure a registrant will not be able to postpone his induction indefinitely by presenting new conscientious objection claims to the officials at the induction center after his original conscientious objection claim has been denied. The induction officials must send the new claim to the local board to consider whether a reopening is warranted, *United States v. Stafford*, 389 F.2d 215 (2nd Cir. 1968), and the board must *consider* such matter, *United States v. Shermeister*, 425 F.2d 1362 (7th Cir. 1970), but the board need not reopen unless there is new evidence not previously presented, *United States v. Mulloy*, 398 U.S. 410, 418 n.7 (1970). If the board decides not to reopen, there is no administrative appeal from that decision and the board is required merely to notify the registrant of this decision, 32 C.F.R. § 1625.4, the existing Order to Report for Induction is still valid and the registrant may be indicted should he have refused to take the symbolic step forward. *See, e.g., United States v. Stone*, 3 SSLR 3053 (10th Cir. 1970); *United States v. Gearey*, 368 F.2d 144, 152 (2nd Cir. 1966). (In *Stone* the local board refused to reopen after the induction order was sent but before the registrant had reported for induction and refused to submit. We see no reason why the same procedure could not be followed after the registrant has reported but failed to submit to induction.) It is only when a reopening is granted that a prior induction order is canceled, and that a new induction order is issued after the registrant is reclassified I-A. 32 C.F.R. § 1625.14.

No. 18051

KNOCH, *Senior Circuit Judge.* (dissenting) Reluctantly I find myself in disagreement with the majority. I do not believe that our decision in *United States v. Schoebel,* 201 F. 2d 31 (7th Cir. 1953) should be overruled at this time.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EHLERT *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 120. Argued January 13, 1971—Decided April 21, 1971

The refusal of petitioner's local board to reopen his classification and pass on his conscientious objector claim, made after mailing of his induction notice but before induction, on the basis of a Selective Service regulation that permitted post-induction notice reopening only for a "change in the registrant's status resulting from circumstances over which the registrant had no control," *held* not unreasonable as a limitation on the time within which a local board must act on such a claim, in light of the Government's assurance that one whose beliefs assertedly crystallize after mailing of an induction notice will have full opportunity to obtain an in-service determination of his claim without having to perform combatant training or service pending such disposition. Pp. 2-6.

422 F. 2d 332, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 21, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

The question in this case is whether a Selective Service local board must reopen the classification of a registrant who claims that his conscientious objection to war in any form crystallized between the mailing of his notice to report for induction and his scheduled induction date. The petitioner before us made no claim to conscientious objector status until after he received his induction notice. Before the induction date, he then wrote to his local board and asked to be allowed to present his claim. He represented that his views had matured only after the induction notice had made immediate the prospect of military service. After Selective Service proceedings not material here, the petitioner's local board notified him that it had declined to reopen his classification because the crystallization of his conscientious objection did not constitute the "change in the registrant's status resulting from circumstances over which the registrant had no control" required for post-induction notice reopening under a Selective Service regulation.[1] The petitioner

[1] 32 CFR § 1625.2 (1971) provides, in pertinent part:

"[T]he classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report

then refused to submit to induction, and a grand jury in the United States District Court for the Northern District of California indicted him for violation of the Military Selective Service Act of 1967.[2]

The petitioner waived trial by jury, and the District Court, holding that ripening of conscientious objector views could not be a circumstance over which a registrant had no control, found the petitioner guilty. The conviction was affirmed by the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, and we granted certiorari, 397 U. S. 1074, to resolve a conflict among the circuits over the interpretation of the governing Selective Service regulation.[3]

A regulation explicitly providing that no conscientious objector claim could be considered by a local board unless

---

for Induction . . . or an Order to Report for Civilian Work and Statement of Employer . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

[2] Military Selective Service Act of 1967, § 12 (a), 50 U. S. C. App. § 462 (a) (Supp. V, 1970), provides in pertinent part:

"[A]ny person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

[3] In accord with the position of the Ninth Circuit, see *United States* v. *Al-Majied Muhammad*, 364 F. 2d 223, 224 (CA4); *Davis* v. *United States*, 374 F. 2d 1, 4 (CA5); *United States* v. *Taylor*, 351 F. 2d 228, 230 (CA6) (*semble*).

Contra, *United States* v. *Gearey*, 368 F. 2d 144, 150 (CA2), 379 F. 2d 915 (after remand), cert. denied, 389 U. S. 959; *Scott* v. *Commanding Officer*, 431 F. 2d 1132, 1136 (CA3); *United States* v. *Nordlof*, No. 18051, at 3–6 (CA7 Jan. 5, 1971); *Keene* v. *United States*, 266 F. 2d 378, 384 (CA10); *Swift* v. *Director of Selective Service*, No. 24,137, at 19–25 (CADC Mar. 16, 1971). See also *United States* v. *Stoppelman*, 406 F. 2d 127, 131 n. 7 (CA1) (dictum), cert. denied, 395 U. S. 981.

filed before the mailing of an induction notice would, we think, be perfectly valid, provided that no inductee could be ordered to combatant training or service before a prompt, fair, and proper in-service determination of his claim. The Military Selective Service Act of 1967 confers on the President authority "to prescribe the necessary rules and regulations to carry out the provisions of this title . . . ." 50 U. S. C. App. § 460 (b)(1). To read out of the authority delegated by this section the power to make reasonable timeliness rules would render it impossible to require the submission, before mailing of an induction notice, of a claim matured before that time. The System needs and has the power to make reasonable timeliness rules for the presentation of claims to exemption from service.[4]

A regulation barring post-induction notice presentation of conscientious objector claims, with the proviso mentioned, would be entirely reasonable as a timeliness rule. Selective Service boards must already handle prenotice claims, and the military has procedures for processing conscientious objector claims that mature in the service. Allocation of the burden of handling claims that first arise in the brief period between notice and induction seems well within the discretion of those concerned with choosing the most feasible means for operating the Selective Service and military systems. Further, requiring in-service presentation of post-notice claims would deprive no registrant of any legal right and would not leave a "no man's land" time period in which a claim then arising could not be presented in any forum.

---

[4] The power of the Selective Service System to set reasonable time limits for presentation of claims, with the penalty of forfeiture for noncompliance, seems never to have been questioned by any court. See, *e. g.*, *United States* v. *Gearey*, 368 F. 2d 144, 149 and n. 9 (CA2).

The only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service.[5] The Selective Service law, indeed, provides for noncombatant training and service for those objectors to whose induction there is no obstacle.[6] The right to civilian service "in lieu of . . . induction" arises only if a registrant's "claim is sustained by the local board." It does not follow, given the power to make reasonable timeliness rules, that a registrant has an unconditional right to present his claim to the local board before induction, any more than he has such a right after induction. Congress seems rather carefully to have confined the unconditional right created by the statute to immunity from combatant training and service. Consequently, requiring those whose conscientious objection has not crystallized until after their induction notices to present their claims after induction would work no deprivation of statutory rights, so long as the

---

[5] The statute on conscientious objection begins:

"Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Military Selective Service Act of 1967, § 6 (j), 50 U. S. C. App. § 456 (j) (Supp. V, 1970).

[6] *Ibid.*:

"Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in [Military Selective Service Act of 1967, § 4 (b), 50 U. S. C. App. § 454 (b)] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate . . . ."

claimants were not subjected to combatant training or service until their claims had been acted upon.

That those whose views are late in crystallizing can be required to wait, however, does not mean they can be deprived of a full and fair opportunity to present the merits of their conscientious objector claims for consideration under the same substantive criteria that must guide the Selective Service System. See *Welsh* v. *United States*, 398 U. S. 333. The very assertion of crystallization just before induction might cast doubt upon the genuineness of some claims, but there is no reason to suppose that such claims could not be every bit as bona fide and substantial as the claims of those whose conscientious objection ripens before notice or after induction. It would be wholly arbitrary to deny the late crystallizer a full opportunity to obtain a determination on the merits of his claim to exemption from combatant training and service just because his conscientious scruples took shape during a brief period in legal limbo.[7] A system in which such persons could present their claims after induction, with the assurance of no combatant training or service before opportunity for a ruling on the merits, would be wholly consistent with the conscientious objector statute.[8]

---

[7] Since such a "no man's land" would be intolerable, our decision today simply involves settling in which forum late crystallizers must have an opportunity for a ruling on the merits. Whether they must have such an opportunity at all cannot be open to question. Of course, a claimant who, after induction, declined to utilize available administrative procedures or who failed to observe reasonable and properly publicized time cutoffs might forfeit his claim.

[8] There is no reason to suppose that a Selective Service local board, faced with the need to fill its monthly quotas, would be more sensitive in applying the legal standards which govern all conscientious objector claims than would the Army, whose mission is to train inductees as members of military units of maximum effectiveness and morale.

The regulation we must interpret in this case does not unambiguously create such a system. It rather bars post-notice reopening "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." It is clear that the regulation was meant to cover at least such nonvolitional changes as injury to the registrant or death in his family making him the sole surviving son. The Government urges that the regulation be confined to just such "objectively identifiable" and "extraneous" events and circumstances. The petitioner contends that post-notice crystallization of conscientious objection is both a "circumstance" within the meaning of the regulation and one over which the registrant has no control.

We need not take sides in the somewhat theological debates about the nature of "control" over one's own conscience which the phrasing of this regulation has forced upon so many federal courts. Rather, since the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such. *Immigration & Naturalization Service* v. *Stanisic*, 395 U. S. 62, 72; *Thorpe* v. *Housing Authority*, 393 U. S. 268, 276; *Udall* v. *Tallman*, 380 U. S. 1, 16–17; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414.

The Government argues for an interpretation identical in effect with the unambiguous rule hypothecated above, which, we have said, would clearly be a reasonable timeliness rule, consistent with the conscientious objector statute. The Government's interpretation is a plausible construction of the language of the actual regulation, though admittedly not the only possible one. Given the ambiguity of the language, it is wholly rational to confine it to those "objectively identifiable" and "ex-

traneous" circumstances that are most likely to prove manageable without putting undue burdens on the administration of the Selective Service System. It appears, moreover, that this position has been consistently urged by the Government in litigation when it was not foreclosed by adverse local precedent.

There remains for consideration whether the conditions for the validity of such a rule, discussed above, are met in practice. It appears undisputed that when an inductee presents a prima facie claim of conscientious objection which complies with timeliness rules for in-service cognizability, he is given duty involving the minimum practicable conflict with his asserted beliefs.[9] It is thus evident that armed forces policy substantially meets the requirement of no combat training or service before an opportunity for a ruling on the claim.

As for the absence of any no man's land, the pertinent military regulations are somewhat inconsistent in their phrasing, perhaps because of the sharp division among the courts of appeals. They contain language appearing

---

[9] Department of Defense Directive No. 1300.6, § VI (B) (May 10, 1968):

"With respect to persons who have already served a portion of their obligated service who request discharge or non-combatant service for conscientious objection, the following actions will be taken:

. . . . . .

"2. Pending decision on the case and to the extent practicable the person will be employed in duties which involve the minimum conflict with his asserted beliefs. . . ."

Army Regulation No. 635-20, ¶ 6a (July 31, 1970):

"[I]ndividuals who have submitted formal applications . . . for discharge based on conscientious objection will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications. In the case of trainees, this means that they will not be required to train in the study, use, or handling of arms or weapons. . . ."

to recognize the obligation of the service to hear the claims of those whose alleged conscientious objection has crystallized between notice and induction, but they also contain formulations seeming to look the other way.[10] We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims, and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims.[11] Our conclusion in this case is based upon that assurance.[12]

---

[10] See Army Regulation No. 635–20, ¶ 3:

"*a.* Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the military service.

"*b.* Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. . . . Requests for discharge after entering military service will not be favorably considered when—

"(1) Based on conscientious objection which existed, but which was not claimed prior to notice of induction, enlistment or appointment."

. . . . .

See also Department of Defense Directive No. 1300.6, § IV (B) (2).

[11] "You also asked whether the Army allows a soldier to file for discharge in instances where his conscientious objector views are fixed after notice of induction but prior to entry into the military service. Present practice grants the soldier the opportunity to file in such cases."

The letter additionally explains the composition and operation of the Army I–O Conscientious Objector Review Board, which has the responsibility of ruling on applications for conscientious objector discharges. The Board is composed of a senior officer, an officer in the Judge Advocate General Corps, a chaplain, and a Medical Corps officer. Only two votes are required to approve an application.

[12] The same letter from the General Counsel of the Army reports that the identical interpretation prevailed in 1965, when the petitioner first was ordered to report for induction.

For if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a prima facie conscientious objection claim for determination under established criteria, see *Welsh* v. *United States, supra,* a wholly different case would be presented.

Given the prevailing interpretation of the Army regulation, we hold that the Court of Appeals did not misconstrue the Selective Service regulation in holding that it barred presentation to the local board of a claim that allegedly arose between mailing of a notice of induction and the scheduled induction date. Accordingly the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 21, 1971]

Mr. Justice Douglas, dissenting.

The rather stuffy judicial notion that an inductee's realization that he has a "conscientious" objection to war is not a circumstance over which he has "no control" within the meaning of the Regulation [1] is belied by experience. Saul of Tarsus would be a good witness: [2]

> "Now as he journeyed he approached Damascus, and suddenly a light from heaven flashed about him, and he fell to the ground and heard a voice saying to him, 'Saul, Saul, why do you persecute me?' And he said, 'Who are you, Lord?' and he said, 'I am Jesus, whom you are persecuting; but rise and enter the city, and you will be told what to do.'"

The stories of sudden conversion are legion in religious history; and there is no reason why the Selective Service boards should not recognize them, deal with them, and, if sincere, act on them even though they come after notice of induction has been received.

The Court holds that the proper remedy is in-service processing of these claims. That is to say, the claims that come so late, even though they come prior to induction, are to be processed by military rather than by civilian personnel.

[1] 32 CFR § 1625.2 (1970).

[2] 9 Acts 3–6.

This conclusion is not required by the Regulation for, as I have said, sudden conversion is a commonplace in religious experiences. And we deal here with religious, ethical, philosophical attitudes that are commonly summarized in capsule form by reference to "conscience."

It is therefore a *tour de force* for the Court to say that in-service processing by the military is required. Certainly that result is not mandated by the Act.[3] Since it is not, we have a choice in construction which really involves a choice of policy. Faced with that choice we should not hesitate to leave these matters to civilian authorities.

Chief Justice Stone, before coming to this Bench, served with two other lawyers named by President Wilson to screen conscientious objectors in World War I. One of the three was in the military, the other two were civilians. In the account he wrote, he said:[4]

> ". . . it was the relatively small residue of non-religious objectors who brought to the Board its real perplexities. While conscience is commonly associated with religious convictions, all experience teaches us that the supreme moral imperative which sometimes actuates men to choose one course of action in preference to another and to adhere to it at all costs may be dissociated from what is com-

[3] See § 6 (j) of the Universal Military Training and Service Act, 81 Stat. 104, 50 U. S. C. App. § 456 (j): "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

[4] Stone, The Conscientious Objector, 21 Col. L. Q. 253, 263 (1919).

monly recognized as religious experience. The President's order expressly recognized that scruples against participating in war might be conscientious although not religious. How to detect the presence of such scruples and to distinguish them from the mere extremist support of more or less novel social or political theories and from mere individualistic resistance to the will of the majority, such as one sometimes sees in the petulant disobedience of an ill-disciplined child, was the difficult task."

The mind of the military has reacted more violently to the conscientious objector than the mind of the priest or other civilian.

The story of in-service processing of these claims in World War I is an unpleasant one:

"The phrase 'well-recognized religious sect' was given the most rigorous interpretation, and any who based conscientious objections on political rather than religious foundations got short shrift. Such objectors were either 'shot to death by musketry,' 'imprisoned for long terms by court martial,' or subjected to indignities and physical violence 'by their more patriotic fellows.'" [5]

Another account [6] is substantially the same:

"In military camp and prison alike, objectors were often subjected to indignities and to physical cruelty. Some were beaten; others were hung by their fingers to the doors of their cells in such a way that their feet barely touched the floor. In one case, an objector who refused to don the army uniform was kept in a damp cell, where he contracted pneumonia and died. His dead body was then dressed in the

[5] Mason, Harlan Fiske Stone, p. 102 (1956).
[6] Sibley & Jacob, Conscription of Conscience, p. 15 (1962).

uniform that in life he had spurned, and, thus attired, was sent home to his family. A number of objectors among the absolutists went on hunger strikes and had to be fed forcibly."

According to the accounts, the treatment of conscientious objectors in World War II was not as severe as in World War I. But the main disciplinary device was to give the man an order and then court-martial him for failure to obey the order. "Here punishment *varied*, but common sentences for objectors were five to ten years, although these were not infrequently reduced on review by Washington. Sentences on the whole were much lighter than those imposed by *courts-martial* during the First World War but more severe, on the average, than those meted out by *civil courts* during the Second World War. Sentences of general courts-martial were served in the several disciplinary barracks of the Army, but in some instances objectors were first sent to a 'rehabilitation center,' where the Army gave prisoners a second chance to 'reform;' if 'reformation' did not take place, they served out their sentences in the disciplinary barracks. Army regulations provided for periodic and automatic clemency reviews, the first during the initial six months of the sentence and subsequent reviews once each year."[7]

I have placed in the Appendix to this dissent a summary of a recent (1969) record in one military center, showing how one conscientious objector in the *Lemond* case was treated.

I do not suggest that every detention center in the Armed Services is like the Brig on Treasure Island, San Francisco Bay. Nor do I suggest that every conscientious objector is treated as cruelly as was the plaintiff

[7] Sibley & Jacob, Conscription of Conscience, p. 108 (1952).

in the *Lemond* case. I do suggest however that in my time every conscientious objector was "fair game" to most top sergeants who considered that he had a "yellow streak" and therefore was a coward or was un-American. The conscientious objector never had an easy time asserting First Amendment rights in the Armed Services.

What might happen to him in the barracks or in the detention center is, of course, not the measure of what would transpire at the hearings. But the military mind is educated to other values; it does not reflect the humanistic, philosophical values most germane to ferreting out First Amendment claims that are genuine.

Our decisions on conscientious objection leave considerable latitude for administrative findings. On one hand *Gillette* v. *United States* and *Negre* v. *Larsen*, — U. S. —, make it clear that objection to a particular war will not qualify for conscientious objector status. On the other hand, both *United States* v. *Seeger*, 380 U. S. 163, and *Welsh* v. *United States*, 398 U. S. 333, demonstrate that the objector need not be religious and his views may be based on broad humanistic grounds. There are subtleties in these positions for, as noted, "§ 6 (j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code should [not] be read to exclude those who hold strong beliefs about our domestic and foreign affairs or *even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy.*" 398 U. S., at 342 (opinion of BLACK, J.) (emphasis added).

Thus under the Court's interpretations of § 6 (j) those who do not qualify are those who lack sincerity, do not oppose all wars, or those who rest their beliefs "solely upon considerations of policy, pragmatism, or expediency." *Id.*, at 342–343. Decision as to whether an in-

dividual is entitled to a conscientious objector status under these broad criteria requires great sensitivity on the part of those who have the final say.

Ehlert's claim itself falls somewhere between *Gillette* and *Welsh*. In addition it raises claims between pragmatism and a respect for human life and values. His beliefs are not religious in nature. He stated they came from "the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager-to-know and questioning mind." In a letter refusing induction he stated his objection was "that the sole purpose of military service in this country today is preparation for a nuclear orgasm which would be totally destructive of human life and values." On his Form 150 he wrote "that service in the armed forces of this country at this time is work toward the end of the destruction of the human race. I consider that my duty not to work for the destruction of the human race superior to any duties which may arise from any human relation." He added he would use force where its use "would not make more probable the destruction of the human race."

While it appears that Ehlert's claim may be sufficiently close to *Gillette* to foreclose his claim, other claims in this sensitive area may not be as close to *Gillette*, yet also may be beyond *Welsh*. In a choice between civilian and military factfinders dealing in an area of conscience clearly the former are to be preferred.

Moreover, proof of a conscientious objector's claim will usually be much more difficult after induction than before. Military exigencies may take him far from his neighborhood, the only place where he can find the friends and associates who know him. His chance of having a fair hearing are therefore lessened when the hearing on his claim is relegated to in-service procedures. For these reasons I would resolve any ambiguities in the law in favor of pre-induction review of his claim and

not relegate him to the regime where military philosophy, rather than the First Amendment, is supreme.

Beyond all these arguments is a constitutional one. Induction itself may violate the privileges of conscience engrained in the First Amendment. A compelled act was the heart of the case presented by *Board of Education* v. *Barnette*, 319 U. S. 624, when children of Jehovah's Witnesses protested to the requirement that they salute the flag. We said:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort . . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Id.*, at 640–641.

To some conscientious objectors, taking the one step forward is an act violating the conscience, since wearing the uniform in any form is as revolting to them as saluting the flag was to the children in the *Barnette* case.[5] To another conscientious objector the bearing of arms, not acting as orderlies, say, in military hospitals, is the act at which the conscientious objector rebels. The sorting and sifting of these claims and all varieties of them are best processed by civilians rather than the military. The present Regulations permit it and I would resolve any ambiguities in favor of the procedure most protective of the rights of conscience involved here.

I therefore dissent from affirmance of the judgment below.

---

[5] See *United States* v. *Freeman*, 388 F. 2d 246, 248-249.

APPENDIX

On September 15, 1969, I entered a stay in the case of *Jones* v. *Lemond*, 396 U. S. 1227. Jones was in the United States Navy and his claim to discharge as a Conscientious Objector arose five months after his enlistment. According to the allegation he had made many attempts over a period of some 37 days to file an application to be discharged as a conscientious objector. He was unable to make a filing or obtain a hearing. He went AWOL on that account and later surrendered himself and with the help of legal advice pressed for processing of his Conscientious Objector claim.

I did not reach the merits of that controversy, but in view of the representations made I restrained the Navy from confining Jones in the brig at Treasure Island, which according to the affidavits presented to me had become a house of horror.

"After sitting in the room approximately 45 minutes, I heard Mr. Foreman say, 'He is an escape risk and is to be sentenced for 5 months—he is not to be allowed to phone anyone.' Immediately after I heard Mr. Foreman speak, a Marine Sergeant opened the door and said to me 'empty your pockets, f—er.' I began to empty my pockets to which the Sergeant said, 'hurry up, Goddamnit.' When I had finished emptying my pockets the Sergeant said, 'up against the wall—spread your arms and legs.' I spread my arms out against the wall and placed my feet approximately 3½ feet apart. The Sergeant kicked my legs several times and said, 'Move them further.' I then stretched them as far as possible, so the Sergeant kicked me a couple of more times to make sure they were spread as far as possible. He then frisked me, which involved slapping and shoving me against the

wall. When he finished his so-called frisk, he handcuffed my hands behind me and said, 'Alright, let's go—one f--k-up and I'll bust your f--kin head open.'

"I was then taken to the Brig and told to stand in front of the fence with my nose on the canvas. I stood at attention with my nose on the canvas and the Sergeant went into the main control room.

"About 5 minutes later the Sergeant came out with another Sergeant. The Sergeant said 'empty your pockets.' I took out a pen and chow pass and offered them to the second Sergeant. He said, 'don't point at me f--ker, put that s--t in your hat.' I emptied my pockets and put everything into my hat. The Sergeant said, 'put it on the ground.' The Sergeant said to the other Sergeant, 'he's still pretty salty—I got him when I picked him up, but he still thinks he's tough.' The reply was, 'don't worry, he won't be so tough, I know what to do with him.' He said, 'spread your arms and legs turd.' I spread out against the canvas. He started kicking me and yelling, 'spread out a--hole.' He kept kicking me and yelling until I fell down and then said, 'what's wrong with you pussy can't you stand up—get up.' I stood up and he said 'spread out Goddamnit.' He started kicking me again. When I fell to my knees against the canvas he stopped and said, 'can't you stand up squid?' This time I got up and spread out hands on the canvas before he could say so. He then pushed my face into the canvas, slapped my neck and arms, punched me in the sides, yanked the crotch of my dungarees painfully between my legs, slapped and pinched my legs and said, 'alright now stand at attention.' He had now finished frisking me so they both went back into the control room taking with them the contents of my pockets in my hat.

"After much verbal harassment, I was taken to my cell.

"A couple of hours later I heard the orange badges march in. They live in the Annex in 6' x 6' x 8' cells, 3 men per cell. I heard a Corporal yelling at an orange badge for not running fast enough during the physical exercise period. He then made the orange badge do push-ups until he collapsed. Then I could hear the Corporal hitting the man and the man crying and screaming for him to stop. When the Corporal stopped they took the man back out into the compound to run and that was the last I heard of him.

"Dinner was brought to my cell and I ate it on the floor as I did with all the rest of my meals.

"Early in the evening a Corporal started harassing a confinee who was locked in the suicide risk cell. Suicide risks have to sit in the cells, which I found to be very cold with my clothes on, in nothing but a pair of underwear. The Corporal kept antagonizing the man until he started screaming and crying. Once the Corporal succeeded in breaking the confinee he started laughing, at which time the other Corporal said, 'why don't you kick his ass for making so much noise?'

"The next day I was taken for a haircut. Another confinee cut my hair and while doing so he dropped a clip but couldn't find it. I told him where it was and he said, 'don't let them catch you talking to me, they'll kick your ass.' I kept quiet.

"After much more harrassment, I went back to my cell and I heard a man coughing and then a Corporal yelling at him to shut up. Two other Corporals joined in harrassing the man and when he couldn't stop coughing they pulled him out of the cell and made him dive on a cup on the floor pretending it was a grenade. They got several other men out of their cells and had them all diving on the cup with the coughing man on the bottom each time.

"It wasn't long after the grenade drills when the turnkey came to my cell and let me out. He had me fold up my blanket and pick up my locker and pulled me out to the control office. In the office there were 4 or 5 Sergeants and a Staff Sergeant yelling and screaming all types of phrases, such as, 'you'll be back, f--ker and then you'll really get it.' I now was told to stand holding my footlocker with my arms extended and they seemed to forget me for a moment.

"Then they began talking among themselves and I realized that my lawyer, Don Jelinek and Loren Basham, a member of the Resistance, were outside the Brig in a car and they apparently insisted on remaining there until I was released. The Sergeant said 'This guy (Jelinek) just pissed me off because he just charged in here and slapped this order down and said "get this man out."' Then the Sergeant said, 'I have a psychiastrist over here (pointing to the medical building right behind us), who will back me up saying I am not responsible for anything I do.' He then added, 'In a minute I am going to go out and blow their heads off.'

"Then the Sergeant seemed to gain control of himself. The MP then turned to me and said, 'Just try and run boy, I would love to blow your head right off.'

"I was then allowed outside the Brig where I saw my Lawyer who spoke to me, but I was afraid to answer him for the fear they would beat or shoot us.

"I know they worked me over because of anger because the Military Court of Appeals gave me an order keeping me out of the Brig. Now that a second Court Order has gotten me out of the Brig, I feel they will kill me if I have to go back in again."

SUPREME COURT OF THE UNITED STATES

No. 120.—October Term, 1970

William Ward Ehlert, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 21, 1971]

Mr. Justice Brennan, with whom Mr. Justice Marshall joins, dissenting.

Selective Service Regulation 1625.2, 32 CFR § 1625.2 (1970), relieves a local board of its general obligation to consider a registrant's claim for deferment whenever the claim is received after the notice to report for induction has been mailed "unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." The Court of Appeals held that this regulation relieved the local board of the necessity of considering any claim that a registrant's conscientious objection to war had crystallized after receipt of an induction notice because, in the court's view, registrants have control over such changes in their beliefs. 422 F. 2d 332 (CA9 1970). The Court here finds it unnecessary to come to grips with this holding and consider whether a conscientious objection claim comes within the terms of this regulation, since it finds the interpretation of the regulation controlled by "a reasonable, consistently applied administrative interpretation." *Ante*, at 6.

I cannot defer to an interpretation I cannot discover. All of the cases cited by the Court make clear that judicial interpretation of an ambiguous regulation is to be informed by reference to *administrative practice* in

interpreting and applying a regulation, not by reference to positions taken for the purpose of litigation. See cases cited *ante*, at 6. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, — U. S. —, — (1971). The national Selective Service office has apparently made no national administrative interpretation of the regulation. The only other information presently before us indicates that state Selective Service headquarters in North Carolina and California have interpreted the regulation to require local boards to consider "late crystallization" claims and to consider whether the registrant's conscientious objection was a change occurring after receipt of his induction notice over which he had no control. Brief for Petitioner, at 28 n. 53. If anything, this suggests that petitioner's interpretation should prevail. On this state of the record, however, I hardly think administrative practice can properly form the basis of decision.

Moreover, I do not find the regulation to be ambiguous. In the context of a blanket Selective Service regulation applicable to all claims for deferment and exemption, the reference to "circumstances" must be taken to refer to any conditions relevant to eligibility for a deferment or exemption. Since conscientious objection to war is the basis for a deferment, it must constitute a "circumstance" within the plain meaning of the regulation. The question, therefore, is whether that circumstance can be one "over which the registrant had no control." On that score, I fully agree with the dissent of Judge Merrill below:

> "One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.

> "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." 422 F. 2d, at 339.

In sum, I think the regulation means that late-crystallization claims asserted prior to induction should be processed by civilian personnel of the local boards, who have been designated by the Congress as the appropriate decisionmakers in these cases, rather then by military personnel during inservice processing. I dissent.